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In The

Supreme Court of the United States

October Term, 1980

No. 79-1477

SEBASTIANA DiMAURO
Petitioner

Vs.

GEORGE M. PAVIA, EDGAR A. HARCOURT
d/b/a PAVIA & HARCOURT, and BOSTON
OLD COLONY INSURANCE COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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March 19, 1980

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The petitioner, SEBASTIANA DiMAURO, prays that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Second Circuit rendered in these proceedings on December 28, 1979.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit is unreported and appears at Appendix A, *infra,* pp. 1a-3a. The opinion of the United States District Court for the District of Connecticut (granting the defendants' motion for summary judgment) is unreported and appears at Appendix B, *infra,* pp. 4a-33a. The opinion of the United States District Court for the District of Connecticut on the plaintiff's motion to remand is unreported and appears at Appendix C, *infra,* pp. 34a-41a.

JURISDICTION

The order or judgment of the United States Court of Appeals for the Second Circuit was entered on December 28, 1979. See Appendix A, p. 1a, *infra.* This petition for certiorari was filed less than 90 days from the date aforesaid. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

The petitioner commenced this action in the Superior Court of the State of Connecticut seeking damages and equitable relief in connection with the defendants' fraudulent and negligent acts in the administration of the estate of the petitioner's late husband. The defendants removed the case to the United States District Court based on diversity of citizenship. 28 U.S.C. §1332(a)(1). That court granted the defendants' summary judgment motion on the basis of collateral estoppel and equitable estoppel. The United States Court of Appeals for the Second Circuit affirmed. The questions thereby arising are:

1. Whether a District Court should abstain from exercising diversity jurisdiction in a civil action involving a pending probate proceeding where no final decree has been rendered by the probate court. (12 ALRFed 292)

2. Whether Rule 56 of the Federal Rules of Civil Procedure and the doctrine enunciated by this Court in *Granny Goose, Inc.* vs. *Teamsters Local 70.* 415 U.S. 425, 439-440(1974) apply not only to state "temporary restraining orders" but to state court ex parte injunctions generally.

3. Whether a decree of a New York Surrogate's Court may bar claims for negligence and breach of fiduciary duty brought in another state by a beneficiary who has no contacts with the State of New York.

4. Whether summary judgment under Rule 56 of the Federal Rules of Civil Procedure may be rendered against a plaintiff based on the presence of defendants' unverified foreign translations in the district court's file, and where the plaintiff not only is unable to communicate in English but is only "marginal[ly] litera[te] in her native language (Italian).

CONSTITUTIONAL AND STATUTORY PROVISIONS

This case involves the Due Process Clause of the Fourteenth Ammendment to the Constitution of the United States; 28 U.S.C. §1450; Section 52-473 of the General Statutes of Connecticut; Section 52-475 of the General Statutes of Connecticut. These are printed in pertinent part in Appendix D, pp. 42a-43a, *infra.*

STATEMENT OF THE CASE

On January 25, 1970, while the petitioner and her husband, both of whom had been residents of Bridgeport, Connecticut for many years, were visiting Europe, the petitioner's husband suffered a heart attack, resulting in his death and intestacy. Thereafter the petitioner came to the Rome office of duPont (a brokerage firm with offices in Bridgeport where her husband long had maintained a brokerage account) which referred her to the Rome office of the defendant Pavia & Harcourt, a New York based law firm.

Subsequently, the defendant Pavia (of Pavia & Harcourt) assumed the office of administrator of the estate of Orazio DiMauro. Since duPont had an office in New York City, which conveniently was also the defendants' principal office, Pavia undertook administration of the estate in New York, where presumably stock certificates were held.

On June 23, 1970, an attorney from the defendant law firm presented the petitioner with a letter drafted by the defendant law firm. The defendants strongly advised the petitioner to sign the letter, which authorized retention of the stock and, relying on this advice, the petitioner executed the document.

On February 17, 1971, the petitioner received a call from the defendants' Rome office, advising her that the principal stock in the estate (Harvey Stores) had reached a peak of 27. In a subsequent telephone call to the defendants in New York the petitioner consented to the sale of the stock. The following day, by letter dated February 19, 1971, Pavia wrote to the petitioner:

> I regret not having been in my office when you telephoned. However, I know you spoke with my colleague, Prof. Albano Murgi, who then told me what you wanted, that is, that it is your desire that the estate of your husband dispose of the Harvey's Stores shares at a price not less than $30.00 each.
>
> At this point, I must decline any and all responsibility in this regard....

This letter — by far the most enigmatic and most crucial between the parties — purports to have been prompted by a conversation between the plaintiff and a "Prof. Albano Murgi." Yet, not only did Pavia obviously have no personal knowledge of this conversation, but Edgar A. Harcourt of the defendant law firm claimed in his affidavit that it was with *him* that the petitioner spoke. No affidavit was ever tendered by Albano Murgi and the petitioner was never given the name of the party with whom she spoke.

By letter dated February 23, 1971, the petitioner authorized in writing the sale of stock. Between February and September of 1971, the plaintiff pleaded for a meeting with Pavia. Pavia, however, failed to respond.

The estate remained open throughout 1972 and 1973. After the New York probate proceeding was opened in May, 1970 a probate proceeding occurred in the Bridgeport, Connecticut Probate Court in December, 1971 solely for the purpose of processing the decedent's Connecticut estate taxes.[1]

Here, too, Pavia was the administrator. A Connecticut succession tax return was filed in May, 1972. By order dated August 23, 1972, the Bridgeport Probate Court, upon Pavia's representation, recited that the administrator had settled his account and that the entire amount remaining after payment of taxes, debts, fees and expenses *should be distributed to the petitioner.* Pavia then represented that payment to the petitioner *had been made.* No such distribution, however, was made until 1976, upon order of the District Court.

In August, 1973, the petitioner returned to the United States and met with the defendants whereupon she was informed that, although the estate had been substantially depleted due to a diminution in value of Harvey Stores stock, Pavia & Harcourt intended to sell whatever amount of the remaining assets was necessary in order to pay their own fees and commissions.

Pavia filed his final account together with a petition for its approval *with the New York Surrogate's Court on January 10, 1974.* A citation was then mailed to the petitioner — four years after the decedent's death. A proceeding was scheduled for February 1, 1974 to settle Pavia's account as administrator. At the

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[1]Because of the limited purpose of the Connecticut probate proceeding, the decree of the Connecticut probate court is not given the broad res judicata attributes imputed to the decree of the Surrogate's Court. *Kochuk* vs. *Labaha,* 126 Conn. 324, 326, 10 A2d 755(1940); *Marks' Appeal,* 106 Conn. 58, 63, 163A600 (1932).

February 1 proceeding, Harcourt appeared for Pavia, and petitioner's Connecticut counsel, while physically present, did not enter an appearance. At the request of petitioner's Connecticut counsel, the proceeding was postponed by the court clerk.

On February 12, 1974 the instant action was commenced in the Superior Court for Fairfield County, Connecticut. At that time, the petitioner applied for and was granted an ex parte injunction, prohibiting Pavia, Harcourt and their law firm from "taking any further action in connection with the estate, including but not limited to any further proceedings in the Surrogate's Court for the County of New York...*except pursuant to further order of this court.*" [emphasis added]

Thereafter, the following chronology of events occurred:

1. By petition dated March 11, 1974, the defendants removed the suit to the District Court on diversity grounds.

2. On October 1, 1974, the District Court denied the petitioner's motion to remand the matter to state court. [Appendix C]

3. On May 22, 1975, the District Court granted the petitioner's motion to compel distribution of the estate.

4. On or about June 12, 1975, the District Court ordered Pavia to turn over to the petitioner all assets of the estate in his possession or subject to his control, less $47,000.00 in dispute.

5. On September 10, 1975, petitioner filed a Motion for Contempt for Pavia's failure to comply with the foregoing order of the Court.

6. On or about September 22, 1975, Pavia filed with the Surrogate's Court despite the existing injunction, an "Affidavit of Services" in which he "request[ed] that the Court grant fees in the amount of $60,000.00, of which $28,000.00 has been paid on account, leaving an unpaid balance of $32,000.00, and that the Court grant commissions in the amount of $15,000.00...."

7. Eleven days thereafter, on October 3, 1975, the Surrogate's Court, without notice or hearing to the petitioner, rendered the "Decree on Accounting" which the courts below have held barred the instant action.

Two years thereafter the defendants moved for summary judgment based on (1) equitable estoppel, claiming the petitioner had consented to the retention of stock from February, 1971 through 1973, and (2) collateral estoppel, claiming that her civil action was barred by the intervening decree of the Surrogate's Court. The District Court granted the defendants' summary judgment motion on both grounds and the Court of Appeals for the Second Circuit affirmed.

REASONS FOR GRANTING THE WRIT

1) The decision below is in conflict with this court's decision in *Princess Lida* vs. *Thompson*, 305 U.S. 456 and with the decisions of other circuits — (Abstention)

Princess Lida of Thurn an Taxis vs. *Thompson*, 305 U.S. 456, 59 S.Ct. 275, 83 L.Ed 285, as here, "present[ed] the question whether the exercise of jurisdiction by a state court over the administration of trust deprives a federal court of jurisdiction of a later suit involving the same subject matter."[2] 305 U.S. at 457. In *Princess Lida*, after an accounting had been filed in a state court, as in the instant case, a suit was brought in federal

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[2]The parties as well as the court below are in agreement that the principles with regard to trust funds are equally applicable to decedent's estates generally. See *Mullane* vs. *Central Hanover Bank & Trust Company*, 339 U.S. 306, 311(1956).

court "against the two trustees and the administrators of the deceased trustee, alleging mismanagement of the trust funds and praying that the trustees be removed and all the defendants be made to account and repay the losses of the estate." 305 U.S. at 459. Noting that upon the filing of the fiduciaries' accounting, the jurisdiction of the state court was "exclusive," this Court accordingly held that the federal court was "without jurisdiction" of the suit subsequently brought. 305 U.S. at 467.

Princess Lida is fully dispositive of the instant case. Since, when the District Court acted on the petitioner's motion to dismiss, the defendants had filed a final accounting in the Surrogate's Court, the District Court should have abstained from exercising jurisdiction.

Since *Princess Lida,* this court has but once addressed the diversity jurisdiction of the federal court in suits concerning the administration of decedent's estates. See *Markham* vs. *Allen,* 326 U.S. 490, 66 S.Ct. 296, 90 L.Ed 296. Lower courts have taken the initiative in fashioning their own rules, focusing on "whether or not the executor's or administrator's final accounting has been *approved* by a state probate court. Where there has been a final accounting in the state court, federal jurisdiction has generally been upheld...but where there has not yet been a final accounting in the state court, federal jurisdiction has generally been denied..." Annot. 12 ALR Fed 292, 301 [emphasis added]; see *Feist* vs. *Fidelity Union Trust Company,* 29 F. Supp. 51 (D.C.N.J. 1939); *Osterling* vs. *Commonwealth Trust Company,* 35 F. Supp. 704 (D.C.Pa. 1940), affirmed per curiam 115 F. 2d 809 (3rd Cir. 1941); *Starr* vs. *Rupp,* 421 F. 2d 999 (10th Cir. 1970); *Lightfoot* vs. *Hartman,* 292 F. Supp. 356 (D.C.Mo. 1968); *Rousseau* vs. *United States Trust Company,* 422 F. Supp. 447 (D.C.N.Y. 1976). Even under this criterion, of course, the district court should have declined jurisdiction since although the defendants had filed their final account with the Surrogate's Court on January 10, 1974, the decree *approving* the accounting was not rendered until October 1975 — sixteen months after the petitioner moved to remand the action and a year and a half after the defendants had removed the matter to

the federal court. The Second Circuit, however, has deviated even further, evolving an entirely distinct test:

> The standard for determining whether jurisdiction may be exercised is whether under state law the dispute would be cognizable only by the probate court. If so the parties will be relegated to that court; but where the suit merely seeks to enforce a claim *inter partes,* enforceable in a state court of general jurisdiction, federal diversity jurisdiction will be assumed.

Lamberg vs. *Callahan,* 455 F. 2d 1213, 1216 (2d Cir. 1972), see also *Tarlton* vs. *Townsend,* 337 F. Supp. 888 (D. C. Miss.); *Bassler* vs. *Arrowwood,* 500 F. 2d 138 (8th Cir.), cert. den. 419 U.S. 116.

By way of dicta, this court also has said that federal courts have jurisdiction "...to entertain suits in favor of creditors, legatees and heirs...against a decedent's estate to establish their claims so long as the federal court does not interfere with the probate proceedings or assume general jurisdiction of the probate or control of the property in the custody of the state court." *Markham* vs. *Allen,* 326 U.S. 490, 494 66 S. Ct. 296, 298, 90 L.Bd. 256, 259 (1946). In the instant case the District Court, inheriting as it did the injunctive order entered by the Superior Court, became the principal disrupter of the Surrogate's administration of the estate. Not only was administration delayed for a year-and-a-half, but ultimate distribution of the assets of the estate was not made pursuant to the Surrogate's decree but pursuant to the District Court's order of June 12, 1975 directing Pavia to turn over to the petitioner all available assets in his possession or subject to his control less the amount of $47,000.00. Pavia himself pleaded that the District Court had placed him in a dilemma since, he claimed in his Affidavit in opposition to the plaintiff's motion for contempt, he could not comply with the District Court's order without "taking appropriate steps in the Surrogate's Court." The net result was that Pavia indeed did return to the Surrogate's Court where he procured the decree which he later successfully set up as a bar to the petitioner's litigating her case on its merits.

2) The Decision Below Conflicts with This Court's Pronouncement in *Granny Goose Foods, Inc.* vs. *Teamsters Local 70,* 415 U.S. 425.

As mentioned *supra,* at the commencement of this civil action in the Connecticut Supreme Court the petitioner applied for and obtained an ex parte injunction prohibiting the defendants from "taking any further action in connection with the estate, including but not limited to any further proceedings in the Surrogate's Court...*except pursuant to further order of this court.*" [Emphasis added] Nonetheless, on or about September 22, 1975, after announcing his intention to return to the Surrogate's Court, Pavia filed with that court, despite the existing injunction, an "Affidavit of Services" in which he "request[ed] that the Court grant fees in the amount of $60,000.00, of which $28,000.00 has been paid on account, leaving an unpaid balance of $32,000.00, and that the Court grant commissions in the amount of $15,000.00...." Eleven days thereafter, on October 3, 1975, the Surrogate's Court, without notice or hearing, rendered the "Decree on Accounting" which the District Court held barred the instant action.

During the pendency of this action, this Court, in *Granny Goose Foods, Inc.* vs. *Teamsters,* 415 U.S. 425, 94 S. Ct. 1113, 39 L.Ed.2d 435 (1974), held that a *temporary restraining order* issued by a state court was not transformed into an order of unlimited duration by 28 U.S.C. §1450 upon removal to the federal court. Beyond the unanimous holding of *Granny Goose,* the Court propounded the following rule:

"An *ex parte* temporary restraining order issued by a state court prior to removal remains in force after removal no longer than it would have remained in effect under state law, but in no event does the order remain in force longer than the time limitations imposed by Rule 65(b) measured from the date of removal." 415 U.S. at 439-440.

The petitioner argued below that since the Surrogate's Court decree was procured in violation of the injunction first obtained in the Superior Court, the defendants could not now set up the

decree as a bar to the instant action. The District Court, however, held, without a scintilla of supporting case law, that "[a]lthough a 'temporary restraining order' (TRO) does not exist in those terms in Connecticut practice, a temporary injunction granted without prior notice and hearing...is *equivalent* to the federal order governed by Rule (65(b), Fed.R. Civ. P." Appendix B, p. 17a. [emphasis added] Accordingly, the District Court held that the injunction entered by the Superior Court had expired after removal pursuant to the rule of *Granny Goose, supra.*

The crux of the issue here is that the Superior Court's injunction was neither in form nor in substance a "temporary restraining order." It was not designated as such. It was not "self-destructing" as are TRO's. Nor was it temporary by its own terms. Moreover, under Connecticut practice the onus is on the persons enjoined to modify or dissolve an injunction. Conn. Gen. Stat. §52-475 [Appendix D]; *Cott Beverage Corporation* vs. *Canada Dry Ginger Ale, Inc.,* 21 Conn. Sup. 244, 245 154 A.2d 140, 141 (1959).

"The Federal Rules of Civil Procedure should be liberally construed, but they should not be expanded by disregarding plainly expressed limitations." *Schlagenhauf* vs. *Holder,* 379 U.S. 104, 121. Since the Superior Court's injunction was not a temporary restraining order, neither the holding nor the rule enunciated in *Granny Goose, supra,* applied. Accordingly, the injunction was in full force and effect when it was violated by the defendants' returning to the Surrogate's Court and procuring a decree. The decree, therefore, could not be set up as a bar to the petitioner's action. See *Byers* vs. *Surget,* 60 U.S. 303, 19 How. 303.

3) The Decision Below Directly Conflicts With This Court's Holdings In *Shaffer* vs. *Heitner, Rush* vs. *Savchuk* and *Kulko* vs. *California Superior Court.*

It is an ancient — and the petitioner would submit patently anomalous — exception to the principles of collateral estoppel and res judicata that a proceeding to settle a fiduciary's account

settles every right which beneficiaries would otherwise have against the fiduciary for improper management of funds during the period covered by the accounting even in the absence of any adversary proceeding, actual litigation of any fact and even in the absence of minimum contacts of a beneficiary with the forum of the court settling the estate. *Krimsky* vs. *Lombardi,* 357 N.Y.S. 2d 671 (Sup. Ct. 1974); *Matter of Roche,* 259 N.Y. 458 (1932). Thus, in the instant case, the October 3, 1975 decree of the New York Surrogate's Court was deemed to have barred the plaintiff's claims against the defendants despite the wholesale absence of any contacts by the plaintiff with the State of New York.

As in *Kulko* vs. *California Superior Court,* 436 U.S. 84, 91 (1978), the petitioner "does not dispute the adequacy of the notice [she] received, but contends that [her] connection with the State of [New York] is too attenuated...to justify imposing on [her] the burden and inconvenience of "pursuing her claim against the defendants in New York." It is submitted that this Tribunal's recent pronouncements on the requirements for the assertion of jurisdiction plainly mandate summary reversal of the present case. As declared in *Shaffer* vs. *Heitner,* 433 U.S. 186:

> The fiction that an assertion of jurisdiction is anything but an assertion of jurisdiction over the owner's property supports an ancient form without substantial modern justification. Its continued acceptance would serve only to allow state-court jurisdiction that is fundamentally unfair to the defendant.
>
> We therefore conclude that all assertions of state-court jurisdiction must be evaluated according to the standards of *International Shoe* and its progeny.

Shaffer vs. *Heitner,* 435 U.S. 186, 212 (1977). Accordingly, a state may no longer use an estate's res to foreclose, as here, a claim against a fiduciary by a beneficiary who has no contacts with the forum state.

While it has been observed that "...the interest of each state in providing means to close [decedent's estates] that exist by the grace of its laws and are administered under the supervision of its courts is so insistent and rooted beyond doubt the right of its courts to determine the interests of all claimants..."; *Mullane* vs. *Central Hanover Bank & Trust Co.,* 339 U.S. at 313; a state has no such interest in the protection of those who, like the defendants, have breached their fiduciary duty, nor will such interests support the exercise of jurisdiction over a nonresident plaintiff with whom the state has no contacts. See *Kulko* vs. *California Superior Court,* 436 U.S. 84, 98 (1978).

In the instant case, the decree of the Surrogate's Court of the State of New York purportedly terminated the plaintiff's claim against the defendants by the fictitious presence in that state of a "res" — here, stock certificates. It is respectfully submitted that such a jurisdictional subterfuge is inconsistent with, if not already overruled by *Rush* vs. *Savchuk,* -U.S.-, 100 S. Ct. 571, -L.Ed.2d- (1980). See also *Shaffer* vs. *Heitner,* 433 U.S. 186. *Kulko* vs. *California Superior Court,* 436 U.S. 84; *World-Wide Volkswagen* vs. *Woodson,* -U.S.-, 100 S. Ct. 559, -L.Ed.2d- (1980).

4) The Decision Below Directly Conflicts With The Repeated And Consistent Pronunciations Of This Court With Regard To Summary Judgment Procedure.

In *United States* vs. *Diebold, Inc.,* 369 U.S. 654 (1961), this Court held that "[o]n summary judgment the inferences to be drawn from the underlying facts contained in ["affidavits, attached exhibits, and depositions submitted"] must be viewed in the light most favorable to the party opposing the motion." 369 U.S. at 655. Since the District Court granted summary judgment to appellee, it was required to resolve all genuine disputes as to any material facts in favor of appellants...." *Arnett* vs. *Kennedy,* 416 U.S. 134, 139 (1973); *Bishop* vs. *Wood,* 426 U.S. 341, 347n. 11 (1976). It also would seem to be hornbook law that, "[a]s the moving party, respondent had the burden of showing the absence of a genuine issue as to any material fact,

and for these purposes the material lodged must be viewed in the light most favorable to the opposing party." *Adickes* vs. *Kress & Co.*, 398 U.S. 144, 157 (1970); *Weinberger* vs. *Hynson, Westcott & Dunning,* 412 U.S. 609, 622n. 18 (1973); *Carter* vs. *Stanton,* 405 U.S. 669, 671 (1972).

The District Court based its conclusion that the petitioner was equitably estopped to sue the defendants for the losses resulting from the retention of the stock of the estate on its finding that the plaintiff had consented to this course of conduct. It furthermore found that this consent was intelligently given. See Appendix B, p. 22a.

These findings were made in the face of patently contradictory material allegations by the parties:

(a). The petitioner proffered her sworn testimony (and the affidavit of an independent interpreter, discussed *infra*) that at no time between 1970 and 1973 did she request or direct the defendants not to sell the estate's stock. As stated in her sworn affidavit, the petitioner throughout the administration of the estate relied upon the defendants in all matters concerned therewith, executing whatever documents they placed before her. While the defendants purported to contradict the petitioner's testimony, they did so by proffering only their own affidavits and the affidavits of attorneys associated with the defendant law firm. As this Court has stated, "The mere fact that the witness is interested in the result of the suit is deemed sufficient to require the credibility of his testimony to be submitted to the jury as a question of fact. *Sonnentheil* vs. *Christian Moretein Brewing Co.*, 172 U.S. 401, 408." *Sartor* vs. *Arkansas Gas Corp.*, 321 U.S. 620, 628.

(b) Moreover, "a district court generally cannot grant summary judgment based on its assessment of the credibility of the evidence presented, see *Poller* vs. *Columbia Broadcasting Co., Inc.*, 368 U.S. 464, 467-468 (1962), 6 J. Moore, Federal Practice §56.02 [10], p. 56-45 (2d ed. 1976)..."*Agosto* vs. *Immigration and Naturalization Service,* 436 U.S. 748, 756 (1977). The District Court, nonetheless, found that the petitioner's testimony

"*clouds some issues but does not raise a genuine issue of fact.*" [emphasis added] Appendix B, p. 33a. As revealed in its decision, the court believed that if enjoyed a license to make such a finding based upon the pronouncement of the Second Circuit that "Rule 56(e) serves the salutary purpose of permitting [the court] to recognize the realit[ies]" of the case; *S.E.C.* vs. *Research Automation Corp.*, 585 F.2d 31, 34 (2d Cir. 1978); thus enabling the court to effectively pierce disputed issues of fact on summary judgment procedure.

While such license not only flies in the face of Rule 56, it is particularly egregious here in view of the petitioner's background which alone was substantial evidence that she was in no position to "direct, induce or consent" to the defendants' actions regarding the buying and selling of securities. Born in Priolo, Siracusa, Italy on January 23, 1914, the petitioner completed only five years of schooling. Until the age of forty-two, she lived in Italy with her two sisters doing only housework. On January 24, 1956 she married her first cousin, the decedent. The only employment which the petitioner has ever had is a "floor girl" at the Norman Dress Company in Bridgeport. Since 1960, the petitioner has maintained but one bank account, the maximum balance of which has been $3,000.00. The petitioner has no children and can neither read nor converse in English. In fact, even her written Italian is of a very elementary level.

The foregoing facts are unvontroverted. They are tendered not to elicit sympathy but to demonstrate that the defendants' contention that the petitioner intelligently consented to the retention of the estate's stock is inherently remote.

(c). Rule 56(c) of the Federal Rules of Civil Procedure authorizes the District Court, in addressing a summary judgment motion, to take notice of "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits" in the court's file. The District Court not only availed itself of this prerogative but went further, drawing inferences from the petitioner's deposition and, more importantly, from the defendants' *unverified* translations of correspondence to and from the petitioner.

Thus, the court in note 15 of its Decision (Appendix B) concluded that "a careful inspection of alternative translations of all relevant documents reveals no difference so significant, either in specific words and phrases or in the tone and emphasis of an entire document, as to raise a genuine issue of material fact." It is submitted that such an attempt to draw inferences from unverified translations is plainly inappropriate. The original Italian documents are no doubt saturated by cultural and linguistic nuances. The District Court was in no position and lacked the expertise to glean inferences from the English translations, particularly where this Court has repeatedly insisted that, in disposing of a motion for summary judgment, the court must resolve all ambiguities and draw all inferences in favor of the party against whom summary judgment is sought. *Bishop* vs. *Wood,* 426 U.S. 341, 347n.11; *Arnett* vs. *Kennedy,* 416 U.S. 134, 139 (1973). Moreover, the District Court was timely alerted to the difficulty of drawing inferences and conclusions from translations of the petitioner's correspondence by the Affidavit of Dr. Ralph Marcarelli, Ph.D., doctor of Italian:

> It is apparent from Mrs. DiMauro's letters that her written Italian is of a elementary level. It is also apparent from these documents that this marginal literacy impeded her ability to express herself fully. *This inability to fully express herself is not reflected in the English translations.*
>
> The translations do not adequately reflect the disparity of educational levels between the plaintiff and the parties with whom she corresponded or the consequent disparity of literary expression which is evident in the Italian documents. [emphasis added]

An utter dearth of case law exists as to what, if any, use a district court may make of unverified translations of documents in its file; nor what procedure might be proper. However, it is not inappropriate to observe that Rule 37 of the Supreme Court Rules provides:

> Whenever any record transmitted to this court shall contain any document, paper, testimony, or other proceedings in a foreign language, without a translation of such document, paper, testimony, or other proceedings, *made under the authority of the lower court, or admitted to be correct,* the case shall be reported by the clerk, to the end that this court may order that a translation be supplied and, if necessary, printed as a part of the appendix.

[emphasis added] Here, none of the translations on which the District Court based its judgment were either "made under the authority of the lower court or admitted to be correct...." Moreover, it is not inappropriate to observe — and indeed it is somewhat ironic — that despite the proliferation of international litigation at all levels of the federal judiciary, Rule 37 has never been construed and, apparently, never implemented.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

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Counsel for the Petitioner
Sebastiana DiMauro

This is to certify that a copy of the within petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit, together with Appendices, has been sent, postage prepaid to:

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Bruce L. Levin
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Supreme Court, U. S.
FILED
MAR 20 1980
MICHAEL RODAK, JR., CLERK

In The

Supreme Court of the United States

October Term, 1980

No. 79-1477

SEBASTIANA DiMAURO
Petitioner

Vs.

GEORGE M. PAVIA, EDGAR A. HARCOURT
d/b/a PAVIA & HARCOURT, and BOSTON
OLD COLONY INSURANCE COMPANY

PETITION FOR A WRIT OF CERTIORARI
TO THE
UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

APPENDIX

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March 19, 1980

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APPENDIX A

UNITED STATES COURT OF APPEALS
for the
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 28th day of December, one thousand nine hundred and seventy-nine.

Present: HON. J. JOSEPH SMITH

HON. WILLIAM H. TIMBERS
Circuit Judges

HON. LLOYD F. MacMAHON
United States District Judge
Sitting by Designation

SEBASTIANA DiMAURO,
Plaintiff-Appellant,

v. Dkt. No. 79-7350

GEORGE M. PAVIA, EDGAR A. HARCOURT c/b/a PAVIA & HARCOURT, and BOSTON OLD COLONY INSURANCE COMPANY,
Defendants-Appellees

Appeal from the United States District Court for the District of Connecticut.

This cause came on to be heard on the transcript of record from the United States District Court for the District of Connecticut, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is *affirmed* substantially for the reasons set forth in Judge Newman's opinion of April 16, 1979.

Plaintiff Sebastiana DiMauro sued George M. Pavia and Edgar A. Harcourt, d/b/a the law firm of Pavia & Harcourt. She charged defendants with negligence in administering and managing her late husband's estate. The district court granted defendants' motion for summary judgment. Plaintiff has appealed from that judgment.

The issues on appeal are:

(1) Do decrees of the Connecticut Probate Court and the New York Surrogate's Court, approving final accountings and discharging defendant administration of her late husband's estate?

(2) Is plaintiff equitably estopped from asserting claims against defendants for actions she induced or agreed to?

(3) Did the district court err in denying plaintiff's motion to remand this case to the Connecticut state court of general jurisdiction?

(4) Did certain of plaintiff's claims become moot subsequent to institution of this suit?

Our careful examination of the record, particularly in the light of the above issues on appeal, satisfies us that Judge Newman properly granted defendants' motion for summary judgment.

As we held in *SEC* v. *Research Automation Corp.*, 585 F.2d 31 (2 Cir. 1978), summary judgment is proper where (1) there is no genuine issue of material fact and (2) the moving party is entitled to judgment as a matter of law. An opposing party cannot avoid summary judgment by mere denials or conclusory allegations, but must come forward with "concrete particulars" to show that material issues of fact do exist.

The major issues in this case are estoppel by judgment and equitable estoppel. Although we hold that the district court was correct in deciding *both* issues as it did, affirmance of its holding on *either* ground would be sufficient to sustain the summary judgment entered in favor of defendants.

We find no error in the court's conclusion that plaintiff is estopped by reason of the probate proceedings from raising claims of negligence against defendants. Notice and an opportunity to raise objections were provided. Plaintiff had retained counsel to represent Surrogate's Court. Her failure to do so is no bar to the application of the doctrine of estoppel by judgment. Defendants therefore were entitled to judgment as a matter of law.

In concluding that no genuine issue of material fact existed, the court had before it depositions, answers to interrogatories, and affidavits and supporting documents. This is not a case in which summary judgment was rendered on the basis of a premature conclusion that material factual issues were not present. Plaintiff cannot rest upon her denials to prevent summary judgment from being entered against her.

Affirmed.

/s/ J. Joseph Smith
J. Joseph Smith

/s/ William H. Timbers
William H. Timbers, Circuit Judges.

/s/ Lloyd F. MacMahon
Lloyd F. MacMahon
United States Circuit Judge
Sitting by Designation

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

SEBASTIANA DiMAURO :
V. : CIVIL NO. H-74-79
GEORGE M. PAVIA, ET AL :

MEMORANDUM OF DECISION ON DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

The plaintiff in this action seeks damages and equitable relief for alleged fraudulent and negligent acts by defendants in the administration of the estate of the plaintiff's late husband. Defendants have moved on a variety of grounds for summary judgment on thirteen of fourteen counts in a second amended complaint (Complaint). They rely primarily, however, on two reasons set forth originally in their answer: that the plaintiff had an opportunity to present the basic claims in this case in a proceeding before the New York Surrogate's Court, and is barred by the decree in that Court from proceeding here; and that the plaintiff "directed, induced and consented" to the actions of defendants out of which the present case arises.

In the nine years since Orazio DiMauro died intestate in Italy, the dispute concerning the disposition of his estate has followed procedural paths leading to a suit of Dickensian complexity. The relevant facts can be derived from affidavits and the products of discovery had thus far,[1] as well as from previous court proceedings. The plaintiff Sebastiana DiMauro (DiMauro) is the sole heir of her husband Orazio, who died on January 25, 1970. The two had lived in Connecticut for several years before they returned to Italy in 1967. From his retirement in 1957 until his death, Orazio DiMauro's primary vocation was investing in the stock market. At his death, he owned securities in three corporations and a home in Siracusa, Italy; approximately 90% of the value of the estate was invested at that time in Harvey's Stores, Inc., a publicly traded corporation. On the date of death the shares of Harvey's Stores were worth approximately $840,000 (some 65,000 shares at nearly $13/share), and were held in a margin account with Francis I. duPont & Co. (duPont).

On December 30, 1969, Orazio DiMauro prepared a handwritten "Sworn Statement" setting forth his wishes for the disposition of his property. Among other provisions the statement included the instruction that the account at duPont "shall remain as it is intact. My stocks shall not be sold."[2] Because the statement was not a valid will, however, an intestacy resulted upon Orazio DiMauro's death. In May, 1970, a probate proceeding was begun in the Surrogate's Court of New York County,[3] and shortly thereafter that Court appointed defendant George Pavia (Pavia) as administrator of the estate. In this capacity, Pavia retained as counsel the law firm of Pavia & Harcourt (of which he and defendant Edgar Harcourt are senior partners). Attorney Ugo Gianformaggio (Gianformaggio) was retained as local counsel in Siracusa, Italy, where plaintiff DiMauro resided.

A series of communications with Mrs. DiMauro during the next three years concerned the Harvey's Stores stock held by the estate. In her initial conference with Gianformaggio, in July, 1970, Gianformaggio asserts that DiMauro expressed a strong desire that her husband's securities be retained.[4] She executed a letter to Pavia to that effect. The letter had been prepared by Pavia, who had recently been nominated as administrator of the estate in New York; he had expressed his own opinion that the securities should not be sold at that time. Harcourt asserts that he told DiMauro by telephone on February 18, 1971, when Harvey's Stores stock was selling for approximately $26/share, that a prospective purchaser wanted the entire block of stock at a price between $20 and $22/share. DiMauro responded that she would not consider selling the stock for less than $30/share. A letter that Pavia wrote to DiMauro on the following day confirmed the information exchanged by phone. It further stated Pavia's conviction that the shares were not worth more than the $7 originally paid by Orazio DiMauro, and his doubts that the stock would remain at its current high price. Pavia specifically "decline[d] any and all responsibility in this regard [holding the stock until it reached 30]."

In September, 1971, DiMauro refused to sell a 90-day option for a call of the entire block of Harvey's Stores stock at 20, and in November she stated that she wanted any sale to be exempt from tax. In January, 1972, attorney Emanuele Turco (Turco) of the Rome office of Pavia & Harcourt wrote DiMauro of the speculative nature of the Harvey's Stores stock, and enclosed a copy of an article from the New York Times reporting that the S.E.C. had filed a civil suit concerning insider-trading in Harvey's Stores. In September, 1972, in response to a margin call made by duPont when Harvey's Stores stock dropped below 4, DiMauro authorized the sale of the other two securities in the estate but not of any Harvey's Stores stock. DiMauro continued to oppose the sale of that stock after her return to the United States in August, 1973.

Throughout this period following the death of Orazio DiMauro, legal proceedings went forward in both New York and Connecticut. After the New York probate proceeding was opened in May, 1970, a probate proceeding was also begun in the Probate Court of Bridgeport, Connecticut, in December, 1971, with Pavia again as administrator. A Connecticut succession tax return was filed in May, 1972. By order dated September 19, 1972, the Bridgeport Probate Court recited that the administrator had settled his account and that the entire amount remaining after payment of taxes, debts, fees and expenses should be distributed to Sebastiana DiMauro.

After DiMauro's return to this country in 1973, Harcourt wrote her in November of his opinion that all the stock in Harvey's Stores should be sold, and of his intent to sell at least enough of the stock to satisfy the remaining obligations of the estate, unless he heard from her to the contrary. DiMauro then retained counsel in Connecticut, who met with Harcourt in December. Pavia petitioned the New York Surrogate's Court for a final accounting and judicial settlement, and a citation to DiMauro was issued on January 10, 1974. The citation was for a proceeding scheduled for February 1, 1974, to settle Pavia's account as administrator, to fix and allow the fees of Pavia & Harcourt, and to authorize Pavia to sell as many of the shares

of stock held in the estate as would be necessary to pay the balance of fees, commissions, costs and disbursements. The citation noted that failure to appear would be taken as consent to the proceedings, unless written objections were filed. At the February 1 proceeding, Harcourt appeared for Pavia, and DiMauro's Connecticut counsel was present but did not enter an appearance. Connecticut counsel was advised that he could, if he desired, retain New York counsel to enter an appearance, and was granted a two-week extension for this purpose.

According to plaintiff's answers to defendants' interrogatories, her Connecticut counsel decided that the more proper response was to file suit in Connecticut. The instant action was commenced in the Superior Court for Fairfield County by a complaint dated February 12, 1974. At the same time, DiMauro applied for and was granted an *ex parte* injunction that prohibited Pavia, Harcourt, and their law firm from "taking any further action in connection with the estate, including but not limited to any further proceedings in the Surrogate's Court for the County of New York." The suit in Superior Court was removed to this Court on diversity grounds by petition dated March 11, 1974.

In September, 1975, Pavia filed an affidavit of services with the New York Surrogate's Court, seeking commissions and fees. The Surrogate's Court filed a "Decree on Accounting" on October 6, 1975, on the basis of the petition, citation, and subsequent proceedings in that Court during January and February, 1974. The decree stated that the citation to DiMauro had been returned with proof of due service,[5] that Pavia had rendered his account to the Surrogate under oath on the return date of the citation, and that no objections had been made to the account. The decree set forth the administrator's commissions and costs and the legal fees that were being allowed; it authorized the sale of a sufficient number of shares held by the estate to satisfy the payments; it ordered Pavia to transfer to DiMauro all cash and securities remaining in his hands after the payments; and it ordered the account judicially settled. The distributions to DiMauro were completed by March, 1976.

DiMauro's general allegations in this suit are that the final account of Orazio DiMauro's estate was filed negligently with the Bridgeport Probate Court, in failing to exhibit the true nature of the estate (Count Twelve of the Complaint), that Pavia failed to administer the estate faithfully in accordance with his legal obligations (Count Thirteen), and that the firm of Pavia & Harcourt failed to advise the administrators of the estate with the care required of the legal profession (Count Fourteen). More specifically, DiMauro's Complaint asserts that Pavia failed to make the distribution of estate assets ordered by the Probate Court (Count One); and that the affidavit of return stating that such distribution had been made was misleading and fraudulent (Count Two). The defendants are charged with having caused financial loss to the estate by their failure to pay the claims against the estate (in particular, the margin account at duPont) that the final account submitted to the Probate Court recited as having been paid (Count Three), to administer the estate in timely fashion (Count Four), to divest the Harvey's Stores stock within a reasonable time (Count Six), and to reinvest and diversify the estate's holdings to cause an appreciation in the value of the estate (Count Seven). The defendants were allegedly negligent in their attempt to administer the estate in New York (Count Five), and in their application to the Surrogate's Court for permission to sell sufficient shares held by the estate to cover fees and costs, in violation of the decree of the Probate Court (Count Eleven). Finally, negligence is charged in Pavia's submission for administrator's commissions ($15,000) and Pavia & Harcourt's submission for attorney's fees ($32,000) that are alleged to be unreasonably high (Counts Ten and Nine, respectively). For all of this, the Complaint seeks injunctive relief, an accounting, removal of Pavia as administrator, and damages of $1,000,000.

In deciding this motion for summary judgment, the Court has the benefit of a recent restatement by the Second Circuit of the law applicable to such motions. *S.E.C.* v. *Research Automation Corp.*, 585 F.2d 31 (2d Cir. 1978). The Rule governing summary judgment procedures, Fed. R. Civ. P. 56(e), provides that when a summary judgment motion is supported by deposi-

tions, affidavits, answers to interrogatories, and admissions, "an adverse party may not rest upon mere conclusory allegations or denials." *S.E.C.* v. *Research Automation Corp., supra,* 585 F.2d at 33. The opposing party must support all allegations made in the pleadings with particular facts and arguments. *Ibid.* In the light of the material provided, the Court can "recognize the realit[ies]" of the case before it, *id.* at 34, to the extent that no genuine issues of fact remain to be resolved. A party will not be allowed to create his own "genuine" issue of fact, however, simply by presenting internally contradictory statements (in affidavits and depositions, for example). *Perma Research & Development Co.* v. *Singer Co.,* 410 F.2d 572, 578 (2d Cir. 1969). See also *Radobenko* v. *Automated Equipment Corp.,* 520 F.2d 540, 544 (9th Cir. 1975).

Estoppel by Judgment

As an initial objection, DiMauro claims that the instant motion must fail for what is essentially an alleged error of pleading. The doctrine of *res judicata* bars relitigation of a cause of action once judgment has entered; the judgment includes claims that were actually made or might have been made. Collateral estoppel bars relitigation, in a subsequent suit brought on a different cause of action, of particular issues actually litigated and determined by the prior final judgment and essential to it. 1B Moore's Federal Practice ¶ 0.405 [1], at 621-23 (2d ed. 1974). Because the defendants have assertedly pleaded collateral estoppel on the basis of prior probate proceedings and because nothing was actually litigated in those proceedings, DiMauro argues that she is not barred from this action.

It is true that a party relying on *res judicata* must plead that doctrine affirmatively. *North Central Truck Lines, Inc.* v. *United States,* 381 F. Supp. 1217, 1220 (W.D. Mo. 1974), *aff'd,* 420 U.S. 901 (1975). The purpose of the requirement is to ensure that a party against whom the doctrine is pleaded is adequately apprised that it is to be used. *Ibid.* (pleading of *res judicata* includes and gives notice of collateral estoppel defense); see also

Crowe v. *Cherokee Wonderland, Inc.,* 379 F.2d 51 (4th Cir. 1967). The defendants' pleading in this case gave ample notice to DiMauro that they would rely on the judgments in probate proceedings as defenses to the instant suit. The second affirmative defense included with defendants' answer stated that "[t]he plaintiff had the full opportunity to raise the matters alleged in this action in the probate proceedings in Connecticut and New York...." It noted that the New York action was not yet concluded, and that the opportunity to litigate still existed in the Surrogate's Court.[6] Thus, no surprise can be claimed by the application of either collateral estoppel or *res judicata.*[7]

The same reasoning defeats DiMauro's contention that summary judgment must be denied because it is based upon an affirmative defense filed in January, 1975, nine months before the Surrogate's Court decree on which the summary judgment motion relies. The affirmative defense, when asserted, noted that DiMauro could have brought and could still bring her objections before the Surrogate's Court. The proceedings in that court, naturally including the final decree that would end them, were relied on as a bar to the instant suit. Moreover, the motion for summary judgment not only referred to the affirmative defense, but also mentioned explicitly the decree of judicial settlement. A decree may be relied upon as *res judicata* although it is rendered after the initiation of proceedings in which the bar is then asserted. See *Princess Lida* v. *Thompson,* 305 U.S. 456 (1939).

Beyond the pleading issue, DiMauro asserts that the proceeding in the New York Surrogate's Court cannot bar the instant action because of the defendants' alleged negligence in undertaking the administration of her husband's estate there before opening the probate proceedings in Connecticut. The New York court's jurisdiction is said to have been defective, and its decree therefore not binding.

The surrogate's court of each county in New York is given jurisdiction by statute over the estate of any non-domiciliary of the state who leaves property within that county. N.Y. Surr. Ct.

Proc. Act § 206 (McKinney 1967). A debt in favor of a non-domiciliary against a domiciliary is deemed personal property. *Id.* § 208. Since the securities constituting the only asset of Orazio DiMauro's estate in this country were physically located in New York County, see *id.* § 208 (4), and since the holding of the securities in street name by duPont in New York City constituted a debt of the firm to Orazio DiMauro, the statutory requirements for the exercise of jurisdiction by the Surrogate's Court in New York County were met.

Defendants' actions in bringing the Surrogate's Court to exercise its jurisdiction were not negligent. To be sure, the Surrogate's Court has discretion in deciding whether to accept applications for original probate of estates of non-domiciliary decedents. See *Cornell* v. *Delehanty,* 18 N.Y.S.2d 153 (Sup. Ct. 1940). And it may be proper to decline jurisdiction over an estate where no substantial tangible personalty of a decedent exists within the estate and intangible property exists in the state of domicile. See *In re MacKean's Will,* 18 N.Y.S.2d 230 (App. Div. 1940). But the exercise of jurisdiction has been held proper where a Connecticut decedent left personal property in New York, although she named as executor of her will a non-resident of New York. *In re Shailer's Estate,* 172 N.Y.S.2d 724 (Sur. Ct. 1957). The interests of New York in Orazio DiMauro's estate are at least as strong. Especially where the Surrogate's Court in fact exercised its statutory jurisdiction, the defendants cannot be said to have been negligent for asking it to do so. The Connecticut Supreme Court has recognized the jurisdiction of the New York courts in an analogous case, where all assets of a trust were located in New York and the issue presented was validity of the exercise of a power of appointment, in Connecticut, by a Connecticut domiciliary. *Morgan Guaranty Trust Co.* v. *Huntingdon,* 149 Conn. 331 (1962).[8]

DiMauro argues that even if the Surrogate's Court proceeding was properly undertaken, she cannot be bound by the final decree if she failed to receive notice and to appear. By her own admission and by recital of the decree of the Surrogate's Court, however, DiMauro did receive notice of the hearing scheduled

for the purpose of closing the administrator's account. Her Connecticut counsel came to the court at the scheduled time, though he did not enter an appearance. The notice was constitutionally adequate to accord DiMauro an opportunity to appear and be heard, in the orderly process of the determination of the interests of all claimants, resident and nonresident, in the estate of her husband. See *Mullane* v. *Central Hanover Bank & Trust Co.,* 339 U.S. 306, 313 (1950).

Anyone on whom process must be served in accounting proceedings may file objections to them. *In reWoods' Estate,* 320 N.Y.S.2d 347 (App. Div. 1971). The failure to file objections in those proceedings forecloses later objection; any different rule would obliterate the benefits of judicial settlements of an accounting. *In re Weir's Will,* 46 N.Y.S.2d 551, 556 (Sur. Ct. 1943). In this case, it was a strategic decision of counsel rather than lack of notice that resulted in DiMauro's failure to appear in a formal manner. Having declined the opportunity provided to file objections to the proposed accounting, she must be bound by the decree to the extent of one who does appear upon notice. *Hochster* v. *City Bank Farmers Trust Co.,* 24 N.Y.S.2d 110 (App. Div. 1940), *aff'd,* 288 N.Y. 588 (1942).

In both Connecticut and New York, the decree of a Court of Probate or a Surrogate's Court is conclusive as to all matters that it embraces. *Nikitiuk* v. *Pishtey,* 153 Conn. 545, 551 (1966); *Kochuk* v. *Labaha,* 126 Conn. 324, 329 (1940). See also *In re Williams' Estate,* 151 N.Y.S.2d 561 (App. Div. 1956).[9] A final accounting, specifically, creates an estoppel with respect to items brought within the administration of the estate. *Kochuk* v. *Labaha, supra,* 126 Conn. at 329. The estoppel reaches only matters that are clearly and specifically set out, and are definitely ascertainable from a reading of the account and decree. *In re Williams' Estate, supra,* 151 N.Y.S.2d at 563; *In re Grace's Estate,* 308 N.Y.S.2d 308 N.Y.S.2d 33 (Sur. Ct.), *aff'd,* 315 N.Y.S.2d 816 (App. Div. 1970). Within that scope, however, the decree is conclusive both as to objections to the accounting that were actually raised and determined and as to matters that could have been raised. *In re Baker's Estate,* 292 N.Y.S. 122

(App. Div. 1936); *In re Blake's Will,* 46 N.Y.S.2d 549, 550 (Sur. Ct. 1943). *Cf.* 3 A. Scott, *The Law of Trusts,* § 220, at 1765 (3d ed. 1967) [hereafter "Scott on Trusts"].

The estoppel effect of prior decrees has usually been discussed in a context where those decrees emerged from a release settlement, or actual litigation involving all interested parties. See, *e.g., In re Schaefer,* 18 N.Y.2d 314 (1966); *In re Jones' Will,* 177 N.Y.S.2d 307 (Sur. Ct. 1958), *aff'd,* 190 N.Y.S.2d 166 (App. Div. 1959); *Grossman* v. *Kass,* 124 N.Y.S.2d 416 (Sup. Ct. 1953). The estoppel arises not because of the type of proceeding, however, but from the opportunity to raise objections. Once presented with that opportunity, a party must avail himself of it or be barred from raising it in later proceedings. The citation to DiMauro concerning the proceedings in Surrogate's Court called attention to the proposed settlement of the administrator's account and to the proposed sale of sufficient shares of stock to cover expenses. This provided ample notice that matters would be determined as to which objections of negligence in investment management would be relevant. Failure to object establishes acquiescence in the accounting. See *In re Emmerich's Estate,* 23 N.Y.S.2d 42 (Sur. Ct. 1940). *Cf. In re Baker's Estate, supra; In re Blake's Will, supra.*

The fact that individual securities were not actually listed in the citation does not constitute any defect in the notice. Had DiMauro chosen to come into court, she could have disputed the specific investments, in particular the retention of the Harvey's Stores stock. The accounting need not include overly minute details; an objecting party has some duty to make timely inquiry, once put fairly on notice. *In re Van Deusen's Will,* 196 N.Y.S.2d 737, 743 (Sur. Ct. 1960). Having decided, upon notice, to forego her chance to appear in the Surrogate's Court, DiMauro is nonetheless bound by its decree.

The scope of the decree includes administrator's commissions and attorney's fees. Especially when the administrator's commissions allowed by the Surrogate's Court were less than the amount permissible by statute, see N.Y. Surr. Ct. Proc. Act

§ 2307 (McKinney 1967 and Supp. 1978), there is no reason to reopen the decree in this regard. See *In re Rosenthal's Estate,* 252 N.Y.S. 596 (Sur. Ct. 1931). The Surrogate similarly acted well within his discretion in allowing attorney's fees in the amount sought. See *Krimsky* v. *Lombardi,* 357 N.Y.S.2d 671 (Sup. Ct. 1974), *aff'd,* 377 N.Y.S. 2d 785 (App. Div. 1976); *In re Baker's Estate, supra.* These principles conclude DiMauro's claims concerning commissions and fees, quite aside from the argument that she is equitably estopped to make these claims by her signing on April 18, 1972, a letter agreeing to commissions and fees in the amounts awarded.

Formally, the Surrogate's Court proceeding is *in rem. In re Kramsky,* 16 N.Y.S.2d 185 (Sur. Ct. 1939). But labels are not dispositive of the issues in this case. *Cf. Mullane* v. *Central Hanover Bank & Trust Co., supra,* 339 U.S. at 312. A judicial proceeding to settle fiduciary accounts settles every right that a beneficiary would otherwise have against the fiduciary for improper management of funds held during the period of the accounting. *Id.* at 311; *cf. In re Hoagland's Estate,* 74 N.Y.S.2d 156 (Sur. Ct.), *aff'd,* 74 N.Y.S.2d 911 (App. Div. 1947), *aff'd,* 297 N.Y. 920 (1948). This is not inconsistent with the rule that a proceeding *in rem* to determine interests in property is conclusive upon persons named as defendants with respect to interests in the property only. *Sherman* v. *Kirshman,* 369 F.2d 886 (2d Cir. 1966). A probate proceeding for a final accounting names no one as defendant, but adequate notice brings interested parties to court, nonetheless. And its results should be conclusive to the same degree as those of the decree settling the trustee's accounts in *Mullane.*

The jurisdiction of the probate court is not based on and limited to attachment of specific property when a party is not present to confer personal jurisdiction on the court. *Cf. East Asiatic Co.* v. *Indomar, Ltd.,* 422 F. Supp. 1335 (S.D. N.Y. 1976). Rather, the probate court in this case had before it the entire assets of the estate in this country and the fiduciary in charge of their disposition. Its jurisdiction is in the nature of *in rem* or *quasi in rem* to the extent that it determines the interests of

beneficiaries in the property in question, and in the nature of *in personam* as to the claims of the beneficiaries against the administrator arising out of the administration of the funds. *Cf.* 5 Scott of Trusts, *supra,* § 568, at 3809. This is so even though the beneficiaries are not resident and are not personally subject to the court's jurisdiction as to claims against them. *Ibid.* This principle was articulated in *Mullane* in the context of the administration of a common trust fund. Extending it to trusts and fiduciary relationships in probate settings in general is justified by the same pervasive state interests in administering in an orderly fashion trusts and estates created under the auspices of its laws, and in making the administration proceedings conclusive to ensure stability for the funds administered and for the administrators.

DiMauro could have litigated in the Surrogate's Court proceeding the issues she raises in this suit other than those involved in the five counts that concern particularly the proceedings in the Connecticut Probate Court.[10] With those exceptions, DiMauro's entire suit raises questions of management of estate assets by the administrator, and of legal advice by the law firm retained as counsel in the administration process in New York. A similar situation was presented in *Krimsky* v. *Lombardi, supra,* where a final settlement entered by the Surrogate's Court was held to preclude a later malpractice suit by executors against the law firm they had retained. The final decree dealt expressly with such matters as estate taxes, guardians' allowances, and attorney's fees, and therefore barred the malpractice allegation of overpayment of estate taxes. The count alleging loss of estate assets from negligence (specifically, alleged incorrect advice concerning the executors' power to continue the high risk business owned by the decedent) was also barred because such matters about corporate transactions were necessarily comprehended in the express provisions of the decree.[11] The same bar operates here.

The bar is recognized in courts of other jurisdictions. Connecticut courts give full faith and credit to judgments of the Surrogate's Court in New York, at least in circumstances where

decision has been rendered after a hearing at which both plaintiff and defendant appeared. *Rathkopf* v. *Pearson,* 148 Conn. 260 (1961). There would be no justification to deny full faith and credit to the judgment because a party with notice of the proceedings chose to stay away from them. To the contrary, any rule denying full faith and credit to a judgment in that situation would frustrate the constitutional full faith and credit provision, by encouraging interested parties with notice to avoid any proceeding in which they doubted their chances of success. Thus, adequate notice permits a probate court to adjudicate a person's claims in the estate and against the administrator. The judgment rendered is entitled to full faith and credit in the courts of another state even though the person with notice failed to appear. *Blum* v. *Probate Court of Chittenden County, Vermont,* 575 F.2d 50 (2d Cir. 1978), *vacated on other grounds,* _____ F.2d _____ (2d Cir. Jan. 17, 1979). See also 3 Scott on Trusts, *supra,* § 220, at 1768. By this rule, the decree of the Surrogate's Court concerning the estate of Orazio DiMauro must receive full faith and credit in the courts of Connecticut.

DiMauro claims that fraud in the procurement of the Surrogate's Court decree strips it of all effect as a bar to this suit. On or about February 12, 1974, the Superior Court for Fairfield County entered an order, upon DiMauro's application, enjoining the defendants from taking any further action in connection with her husband's estate, including the proceeding scheduled for February 15, 1974, in the Surrogate's Court. None of the defendants received prior notice of the application; none appeared before the injunction issued. In September, 1975, Pavia filed with the Surrogate's Court an affidavit of services, and the Surrogate's Court issued its final decree during the following month. DiMauro asserts that the affidavit of services was submitted in violation of the *ex parte* injunction, and that any decree relying on the affidavit was fraudulently induced.

A decree of a probate court may be set aside for reasons of fraud. *In re Van Deusen's Will, supra,* 196 N.Y.S.2d at 740; *Folwell* v. *Howell,* 117 Conn. 565, 569 (1933). See also Conn. Gen. Stat. § 45-9 (allowing collateral attack on a probate court

decree only for fraud); 3 Scott on Trusts, *supra,* § 220, at 1766, and § 260, at 2218. But the decree of the Surrogate's Court was not obtained in violation of an outstanding injunction, and was therefore not fraudulently induced. Although a "temporary restraining order" (TRO) does not exist in those terms in Connecticut practice, a temporary injunction granted without prior notice and hearing, see Conn. Gen. Stat. §§ 52-471, 52-473, is equivalent to the federal order governed by Rule 65(b), Fed. R. Civ. P. See 2 E. Stephenson, *Connecticut Civil Procedure* § 268b, at 1109 (2d ed. 1970); *cf. Morning Telegraph* v. *Powers,* 450 F.2d 97, 99 (2d Cir. 1971) (drawing distinction between TRO and preliminary injunction). Such a temporary order should continue only for the time required to notice and hold a hearing. See Conn. Gen. Stat. §§ 52-473, 52-475; 2 E. Stephenson, *supra,* § 268b, at 1109.

Upon removal of this case from the state court system, the order of the Superior Court remained in effect. 28 U.S.C. § 1450. But the removal did not transform the order of limited duration into a federal court injunction of unlimited duration. Rather, the *ex parte* TRO issued by state court prior to removal remained in force no longer than the time limitations imposed by Rule 65(b). *Granny Goose Foods, Inc.* v. *Teamsters Local 70,* 415 U.S. 423 (1974). According to these limitations, the order "died a natural death," see *id.* at 440, before April, 1974.[12]

Rule 65(b) places on the party obtaining the TRO the burden of applying for and presenting its case to justify a preliminary injunction. DiMauro did not seek the hearing required for injunctive relief beyond the TRO, and the defendants did not consent to an indefinite extension of the TRO. *Cf. New York Telephone Co.* v. *Communications Workers of America,* 445 F.2d 39 (2d Cir. 1971). The defendants in fact filed on May 16, 1975, a motion to confirm the expiration of the temporary order.[13]

The defendants moreover assert that DiMauro forced them to return to the Surrogate's Court, by moving in this Court on

May 20, 1975, that defendants be compelled to convey to her the balance of the estate. After this Court granted DiMauro's motion and ordered a transfer to her of all but $47,000 (the amount already allowed by the Connecticut Probate Court and sought from the New York Surrogate's Court for administrator's commissions and legal fees), Pavia filed for a final accounting to close the Surrogate's Court proceedings. Whether or not he was required to do so, the petition to the court where administration of the estate had been first and properly undertaken was consistent with the decree of this Court.[14] Compare *Adams* v. *Williamson,* 150 Conn. 105 (1962) (executrix denied *res judicata* benefits of probate court decree based on her previous accounts that yielded admittedly excessive payments to her). The actions of the administrator reflect due deference to the courts involved rather than contempt and deception. The estoppel effect of the Surrogate's Court decree is not impaired by any fraud. The estoppel extends to Counts Four, Five, Six, Seven, Nine, Ten, Eleven, Thirteen, and Fourteen.

The same principles of estoppel by judgment apply to the proceedings in the Connecticut Probate Court. The decree of final accounting in that Court recites that it issued upon due notice and hearing, see Conn. Gen. Stat. § 45-267, and DiMauro has not made any claim to the contrary. The concluding proceedings offered an opportunity to object to Pavia's final account. Specifically, questions could have been raised about negligence for an alleged failure to exhibit the true nature of the estate in the final account and accompanying inventory. Because they were not raised, they are now barred by the decree, and Count Twelve of the Complaint, which presses these claims, is therefore dismissed. Specific complaints about the failure to pay off the margin account of duPont and other debts of the estate could also have been made. The Probate Court decree thus disposes of Count Three, also.

Estoppel in Pais

Central to DiMauro's Complaint is the claim that the defendants retained the stock in Harvey's Stores when they should

not have. In this motion defendants make the argument, independent of that concerning estoppel by judgment, that DiMauro "expressly directed, induced, acquiesced in and consented to" the actions of defendants about which she complains. The defendants do not dispute that prudent investment would have involved early sale of this speculative stock, which comprised the bulk of the estate. Rather, they contend that the stock was retained because of DiMauro's actions and that she is thereby equitably estopped to base claims upon the retention.

When one party does or says something upon which he intends another to rely and act, and that second party does so rely and change his position to his detriment, the conduct of the first party estops him to complain about the action taken. See *Mercanti* v. *Persson,* 160 Conn. 468, 477 (1971); *Lynn* v. *Lynn,* 302 N.Y. 193 (1951). Although an administrator must in normal circumstances sell stock owned by a decedent within a reasonable time and at the best price obtainable by reasonable diligence, *Stark* v. *National City Bank,* 278 N.Y. 388 (1938), encouragement or acquiescence by a beneficiary in the retention of securities that eventually lose value prevents the beneficiary from bringing legal action for the loss. *In re Garvin's Will,* 256 N.Y. 518 (1931). By explicit holding in Connecticut, where an administrator, acting in good faith and with ordinary care for the good of the beneficiaries, deviates with their consent from the strict line of his duty and loss results, the consenting beneficiaries cannot charge him with the loss. *Mathews* v. *Sheehan,* 76 Conn. 654, 662 (1904).

The rule has been applied to situations resembling the one presented here, where stock held by a decedent at the time of his death was held after his death by executors or administrators, with the approval of beneficiaries. See *In re Garvin's Will, supra; In re Weston,* 91 N.Y. 502 (1883). The beneficiaries in *In re Kent's Estate,* 261 N.Y.S. 698 (Sur. Ct. 1932), *aff'd,* 284 N.Y.S. 976 (App. Div. 1935), directed that stock be retained with the expectation that they would take it over in kind at the completion of administration of the estate. Their directions barred any complaint, when the stock declined in value. *Id.* at 704-05.

DiMauro instructed Pavia to retain the securities in her husband's estate. The letter that she signed to Pavia in July, 1970, had been prepared by Pavia's law office and reflected his own opinion that the stock should not then be sold (see letter to Gianformaggio of June 23, 1970). But there is no evidence to support a claim that Pavia was not acting in good faith and with proper care. Having only been nominated as administrator in New York, Pavia would reasonably have wanted time to review the estate's holdings before acting. The Harvey's Stores stock, which at the time of Orazio DiMauro's death was selling at nearly 13, dropped thereafter and reached 7 by the end of the year. There is no allegation that Pavia sought any personal financial gain by advising that the securities be retained at the time of his appointment.

By the beginning of 1971, correspondence between Pavia and DiMauro shows clearly that Pavia urged DiMauro strongly to sell the Harvey's Stores stock at that time. From a market value of approximately 7 on January 25, 1971, the stock rose steadily and quickly to approximately 26 on February 18, 1971. That DiMauro carefully considered the matter of retaining the stock is shown by her insistence that it not be sold for less than 30.[15] She remained aware of the movements of the stock and the possibilities of selling it. In her letter of November 12, 1971, to her attorneys she noted that Turco had talked with her about selling the stock at 20; she wanted particularly to know whether any sale would be tax exempt. A letter to Pavia on November 26, 1971, asserted that "I wish that the sale of the block of Harvey's Stores be exempt from Income Tax." The prices she wanted for the sale of stock may have been unrealistically high at the times they were mentioned,[16] *cf. In re Pinney's Estate,* 294 N.Y.S. 29 (App. Div. 1937), *aff'd,* 278 N.Y. 507 (1938), but the estoppel here arises from the fact that DiMauro was taking such an active and detailed interest in the movements of the stock, not that she was an inaccurate market analyst.

If DiMauro's conduct is not held to give rise to an estoppel, legal liability might be asserted for a *failure* to follow instructions to retain securities, in the event stock had been sold and

then rose in price. *Cf. In re Weston, supra,* 91 N.Y. at 511. An administrator or executor is entitled to expect stability in his role as fiduciary, which calls for him at once to act disinterestedly in the best interests of the estate and the beneficiaries, and also to heed the directions of a sole beneficiary. Even communications that are not express directions will bind a beneficiary, if the fiduciary could reasonably interpret them as authorizing and consenting to the actions that he then takes in reliance on them. See *In re Pinney's Estate, supra,* 294 N.Y.S. at 38. The fact that a beneficiary consents to actions that would normally be illegal for a fiduciary estops the beneficiary to complain, although a probate court could not itself authorize or condone the actions. See *In re Packard's Estate,* 261 N.Y.S. 580 (Sur. Ct. 1932) (remaindermen of trust are estopped by their previous consent to assert illegality of investments of trustee that were against terms of the trust).

The communications between DiMauro and the defendants show clearly that she wished the stock in Harvey's Stores not be sold, except at prices that were unrealistic. Her unmistakable intentions obviously put Pavia in a difficult position. His appreciation of this bind is reflected in the February 19, 1971, letter to DiMauro, in which he urged her to accept the then-pending offer for her Harvey's Stores shares (at 20), asserted that he was "absolutely convinced" that the shares were not worth more than the $7 originally paid for them, and declined responsibility for any future drop in price. That he did not decline responsibility as fiduciary in general is clear from his subsequent continued efforts to negotiate a sale of the stock as the price did in fact drop, and his frequent communications with DiMauro about the securities still held in the estate. Defendants showed no bad faith in their dealings with DiMauro. Any stock that Pavia did sell was for the purpose of paying estate taxes and meeting other expenses of administration.

DiMauro asserts that she could not have given her own instructions to hold the stock or to seek a certain price or to sell under specified conditions, because she lacks the education necessary to understand the transactions involved. The corollary

of these assertions is that she automatically followed her lawyer's advice and signed whatever documents they put in front of her.

Her own deposition, despite internal inconsistencies, contradicts this position. She discussed margin accounts and selling stock "to cover the margins" (after asserting earlier that she did not know what a margin account was). When a sale of stock was required by a margin call in September, 1972, she wrote to Pavia to be cautious in the sale of her 11% of the company "because I do not wish to depress the stock...." She had discussed earlier the sale of a "block" of the Harvey's Stores stock, and was concerned about the tax treatment of the sale (she wanted a tax free sale). She knew that "after six months income taxes are paid...only on half the net earnings or net income." She understood that confirmation slips are sent to customers after stock transactions, and used the slips to prepare detailed schedules for income tax purposes. Her failure to continue formal schooling beyond the fifth grade obviously did not prevent her from developing considerable sophistication concerning investments. DiMauro was fully capable of giving directions about investments to Pavia, and Pavia was reasonable in the way he understood her considered opinions and in acting in accordance with the instructions and indications he received from her.

DiMauro is equally estopped to take issue with the administrator's commissions and attorney's fees in connection with the estate administration. Aside from the estoppel by judgment of both the Connecticut and New York courts (which allowed the identical amounts, since no additional fees and commissions were sought by virtue of the second proceeding), an estoppel arises from the agreement that DiMauro signed on April 18, 1972. That letter approved proposed payments of $60,000 for attorney's fees and $15,000 for administrator's commissions. The letter was prepared by the offices of Pavia & Harcourt. DiMauro has represented that she signed the letter on the assumption that the administrator and attorneys had exercised reasonable diligence and shown reasonable care in handling the

estate. This Court finds no indication that the defendants acted otherwise. DiMauro is bound by the letter she executed upon that assumption and with the knowledge, through correspondence a few months earlier about the tax consequences of a sale of stock, that the Harvey's Stores shares had already dropped as low as 12 (see letter from Pavia to DiMauro dated December 13, 1971).

Despite the factual foundation for an estoppel, DiMauro expresses the equitable defense of unclean hands to prevent the application of this doctrine of equity. The principle of unclean hands is usually applied only to prevent affirmative relief, because of some fraud or deceit relating to the matter in issue. See *Precision Instrument Manufacturing Co.* v. *Automotive Maintenance Machinery Co.*, 324 U.S. 806 (1945); *cf. McGrath* v. *Hilding*, 41 N.Y.2d 625 (1977). The fraud on which DiMauro bases her defense is the defendants' alleged violation of the injunction against proceeding with the administration of the estate of Orazio DiMauro. It is not clear that such a fraud would pertain to the retention of securities at the behest of the beneficiary here. But the issue need not be resolved, since it has already been decided that the defendants did not act fraudulently in closing the estate in the Surrogate's Court.

DiMauro is therefore estopped to pursue the claims presented in Counts Three, Six, Seven, Nine, and Ten. The estoppel also extends to any claims included in Counts Thirteen and Fourteen that Pavia failed to act faithfully as administrator, and that Pavia & Harcourt failed to advise the administrator with proper care, by virtue of the retention of Harvey's Stores stock.

Mootness and Failure to State a Claim

The defendants have moved for summary judgment on Counts One, Two, and Eleven, asserting that the claims presented there have become moot since this action was begun. Count One complains of Pavia's failure to distribute to DiMauro the assets of the estate remaining after satisfying claims and expenses, pursuant to the order of the Bridgeport

Probate Court. Since those assets have in fact been distributed, albeit after considerable dispute between the parties and after further order of this Court on June 12, 1975, the claims presented in Count One have become moot. The fact that the sum of $47,000 was withheld from distribution, as allowed in the latter order, does not alter this result. The final account to the Probate Court included the $47,000 in administrator's commissions and lawyer's fees as claims against the estate. Thus, the net amount available for distribution to DiMauro never included that disputed sum.

It should be noted that the amount of money available for distribution, even at the date on which the Probate Court entered its order of distribution, was substantially less than the amount listed by that Court. The order, and the administrator's accounting and succession tax return on which it was based, assumed an asset valuation as of the death of Orazio DiMauro. At the time of his death, Harvey's Stores stock had a market value of nearly 13. At the time the Probate Court entered its order, the market value had fallen below 4. Since the stock in that one company comprised the bulk of the estate, the value of the entire estate had decreased significantly by September 19, 1972.

The retention of the stock had been brought to the attention of the Probate Court in explicit terms in the Connecticut succession tax return (since the original is filed with that Court). The assets, claims and expenses listed in the final account were identical to those in the tax return, with the sole addition of the amount of tax computed as owing in Connecticut. "The mere fact that the account shows property on hand for distribution at a certain dollar figure does not establish a monetary liability on the fiduciary to the distributees in that amount." G. Wilhelm, *Connecticut Estates Practice: Settlement of Estates*, § 319, at 448 (1974) [hereafter *"Estates Practice"*]. The decree settling the account establishes that the fiduciary has the items listed in his accounting, not that they carry the same value. *Ibid.* See also *Sellew's Appeal*, 36 Conn. 186, 193 (1869); *cf. Sachs* v. *Feinn*, 121 Conn. 77, 82 (1936). Thus, in listing the amount

available for final distribution, the Probate Court would have understood in this case that the property still held, in kind, might have a value greater or less than the dollar amount listed.

"Distribution" in this context does not mean disbursement to beneficiaries. It has the specialized meaning of apportionment among beneficiaries. Rather than transferring assets, distribution simply converts the common ownership of all distributees in all estate assets into separate equitable ownership of specific assets. *Estates Practice, supra,* § 325, at 450-60, and § 348, at 493; see also *Mack's Appeal,* 71 Conn. 122, 128-29 (1898); *Kingsbury* v. *Scovill,* 26 Conn. 349, 352-53 (1857). In DiMauro's situation as the sole beneficiary, the Probate Court order of distribution, dated September 19, 1972, could be quickly carried out as a formal matter. The return required by that order and by statute, Conn. Gen. Stat. § 45-19, was duly made by Pavia. For these reasons, Count Two of the Complaint, which asserts that Pavia's affidavit of return was misleading and fraudulent in saying that distribution had been made, lacks merit.

Count Two also lacks merit insofar as it complains of a failure to disburse the property distributed to DiMauro. This count relies on the assertion in the signed affidavit "that all moneys and property...have been paid over and distributed to the persons entitled thereto according to law...and the orders of said [Probate] Court, and that so far as the fiduciary has any knowledge said estate is now fully administered and settled." As explained above, property had been distributed as ordered by the Probate Court. No statutory provision exists in Connecticut for a return by a fiduciary showing that he has delivered and transferred assets in accordance with the order of distribution and return of distribution. See *Merwin's Appeal,* 75 Conn. 33, 36 (1902); *Estates Practice, supra,* § 350, at 496. But the probate court may require a return of final settlement, to show actual disbursement. *Ibid.; cf. Morse* v. *Ward,* 92 Conn. 286, 292 (1917). To disburse the property in this case, however, Pavia needed the additional authorization of the Surrogate's Court in New York, which also had jurisdiction over the estate.

Connecticut statutes do not deal with this situation, but the leading practice book recognizes the gap between Connecticut law and that of states like New York, which allow original probate proceedings of non-domiciliaries' estates if property is located within their jurisdiction. G. Wilhelm, *Connecticut Estates Practice: Death Taxes,* § 66, at 160 (1974). Since the administrator in New York would be liable for succession taxes in Connecticut in a case such as this, *ibid.,* he must realistically come into Probate Court in Connecticut. But he cannot in doing so ignore the Surrogate's Court. In this unusual situation, distribution according to the order of the Connecticut Probate Court would mean apportionment of the proper share of the estate to each beneficiary, and then disbursement in those proportions after approval by the Surrogate's Court. This is precisely the course that Pavia followed, and his return to the Probate Court is taken to signify such action.

Count Eleven has already been dismissed for reasons of estoppel by judgment. Moreover, it rests on similar allegations to those involved in Count Two, specifically that Pavia and Pavia & Harcourt were negligent in applying to Surrogate's Court for permission to sell shares of stock to pay commissions, fees and costs in violation of the Probate Court order of distribution. These claims have no merit for the reasons stated previously. The request made to the Surrogate's Court for fees and commissions did not exceed that allowed by the Probate Court. Thus, the Surrogate's Court allowance to sell shares to cover fees and commissions did not diminish the estate in any greater degree than anticipated by the final order of the Probate Court.

The defendants have moved for summary judgment on Count Twelve for failure to state a claim upon which relief can be granted. Already dismissed for reasons of collateral estoppel, any claims stated in this count also fail on the merits. The final account and inventory in the Connecticut Probate Court, alleged to lack particularity and to exhibit the true condition of the estate, are sufficiently precise to fulfill the purpose of the account. They give interested parties full information regarding the contents of the estate, and establish the property to be dis-

tributed, valued at a particular date. See *Marks' Appeal,* 116 Conn. 58 (1932); *Estates Practice, supra,* § 287, at 408-09. Accounts that must be submitted periodically by fiduciaries need not include updated inventories if there has been no change in the identity of the items in the estate since the last account accepted and approved. Conn. Gen. Stat. § 45-268. Final accounts should be governed by the same principles.

Count Eight, not specifically addressed in the motion for summary judgment, presents a claim of negligence arising out of the failure to apply for a widow's allowance for DiMauro in the Connecticut probate proceeding. This matter could have been raised before the closing of the estate in Connecticut, and is therefore barred by the final decree there from consideration in this case. Even if it could be adjudicated here, the count fails to state a claim upon which relief can be granted. The allowance is discretionary with the Probate Court, Conn. Gen. Stat. §§ 45-250, 45-273a, and is to be given only if judged necessary for the support of the surviving spouse. *Ibid.* Though "necessity" is broad enough to include more than maintenance of the survivor at a mere subsistence level during the administration of the estate, see *Baldwin* v. *Tradesmens National Bank,* 147 Conn. 656 (1960), there is no indication that an allowance is justified for the sole purpose of reducing the value of the estate in order to reduce in turn the estate taxes owing. Count Eight is based on exactly those grounds of decreasing taxes. No allegation is made that DiMauro required an allowance for her support.

In light of the decisions above, it is unnecessary to decide the motion to dismiss the law firm of Pavia & Harcourt as a defendant, for reasons of lack of personal jurisdiction.

Conclusion

The motion for summary judgment is granted. Since the decision disposes of all counts of the Complaint, judgment may enter for the defendants.

Dated at Hartford, Connecticut, this 16 day of April, 1979.

/s/ Jon O. Newman
Jon O. Newman
United States District Judge

FOOTNOTES

[1]The Court has before it a deposition of the plaintiff; plaintiff's answers to defendants' interrogatories, and defendants' answers to plaintiff's interrogatories and documents produced by requests; and affidavits, with attached exhibits, of four individuals: defendant George Pavia (administrator of the estate of Orazio DiMauro), defendant Edgar Harcourt (of the law firm of Pavia & Harcourt), Emanuele Turco (an attorney formerly associated with Pavia & Harcourt in Rome), and Ugo Gianformaggio (an attorney in Siracusa, Italy). Additionally, the defendants have submitted with their motion for summary judgment a statement of material facts as to which they claim there is no genuine issue to be tried. The plaintiff has not submitted a statement of material facts as to which there is a contention of a genuine issue to be tried, as required to Local Rule of Civil Procedure 9(d).

[2]The statement further asserted that even if it failed to qualify as a valid will it should still "be sufficient to show all my intentions, and they should be applied to the letter." Plaintiff DiMauro acknowledges that her husband translated the statement into Italian for her, but she asserts that her husband said that he would sell the stocks he owned.

[3]Orazio DiMauro's securities, the sole assets of the estate in the United States, were physically located in New York County. In addition, the securities were held in street name by duPont, which has its home office in New York City. Orazio DiMauro's last domicile was Connecticut. The real property that he owned was in Italy, and his testamentary statement had been written in Switzerland.

[4]Gianformaggio wrote, in a letter dated July 27, 1970, to attorney Emanuele Turco at the office of Pavia & Harcourt in Rome, that DiMauro "urgently recommends that the shares not be sold because of her strong desire to leave them just as they were left by her deceased husband."

[5]In her application to the Superior Court for the *ex parte* injunction, DiMauro stated that she had "received notice that the defendants have applied to Surrogate's Court for the County of New York for permission to sell shares of stock belonging to the estate.... Such proceedings...are scheduled for a hearing on Friday, February 15, 1974...."

[6]The affirmative defense did not explicitly label the doctrine to be relied upon, though it did state that "the plaintiff is estopped from collaterally attacking" the prior probate judgment in later proceedings. Counsel for defendants noted at oral argument that as a technical matter they deemed the doctrine of *res judicata* unavailable where a party against whom the doctrine is pleaded in a later action was not a formal party in the earlier action producing the judgment relied upon. That interpretation of the law would virtually eliminate the use of *res judicata* on the basis of probate proceedings where parties in interest may not be formal parties to an adversary suit.

[7]Recent decisions of the Supreme Court have shown that the major concern in deciding questions about collateral estoppel should be whether a party has had a full and fair opportunity to try identical issues that arise in serial proceedings. *Parklane Hosiery Co.* v. *Shore*, _____ U.S. _____, 47 U.S.L.W. 4079 (Jan. 9, 1979) (offensive use of collateral estoppel); *Blonder-Tongue Laboratories, Inc.* v. *University of Illinois Foundation*, 402 U.S. 313 (1971) (defensive use).

[8]The denomination of probate proceedings in the state of domicile as "principal" and of those in the non-domiciliary state as "ancillary," *see* G. Wilhelm, *Connecticut Estates Practice: Settlement of Estates*, § 23, at 39 (1974), does not alter the fact that the proceedings of administration in different estates of a single estate are independent of one another. In *re Patenotre's Estate*, 123 N.Y.S.2d 492 (Sur. Ct. 1953). Normally the assets remaining after satisfying resident creditors of the state of ancillary administration are transmitted to the state of domicile, *see* G. Wilhelm, *supra*, § 60, at 78-79; but in New York it is within the discretion of the Surrogate's Court, in unusual circumstances, to direct distribution of the assets remaining after ancillary administration to the next of kin. *In re van Bokkelen's Estate*, 279 N.Y.S. 420 (Sur. Ct. 1935). A case like this, where the "ancillary" proceedings are also the original probate of an estate, certainly justifies such a course.

[9]In this diversity case, state law is to be applied. In determining which state's law to apply, the Court follows the conflict of law rules of Connecticut. *Gibson* v. *Fullin*, 172 Conn. 407, 411 (1977). Connecticut adheres to the usual role that the law of the forum governs questions concerning remedies, as opposed to rights. *Morris Plan Industrial Bank* v. *Richards*, 131 Conn. 671, 673 (1945). Proper classification

can be a difficult and somewhat metaphysical task, as for example when a statute of limitations is "so interwoven with the statute creating the cause of action as to become one of the congeries of elements necessary to establish the right...." *Thomas Iron Co.* v. *Ensign-Bickford Co.*, 131 Conn. 665, 669 (1945) (limitations statute, in such a situation, is considered part of "right" rather than mere "remedy"). Though estoppel — both by judgment and *in pais* — presumably pertains to remedies, it is unnecessary to analyze this issue at length, because there is no inconsistency between the law of New York and Connecticut in these areas. Especially since the law of New York is considerably more fully developed than that of Connecticut, in ways that seem reasonably to indicate the analysis that Connecticut courts would adopt if confronted with the same questions, this Court will draw on the decisions of courts in both states to resolve the present dispute.

[10]Counts One and Two concern Pavia's alleged failure to distribute the estate assets as ordered by the Probate Court in Connecticut, and the allegedly misleading and fraudulent affidavit of return stating that the distribution had been made. Count Three charges that the defendants caused a loss to the estate by a failure to pay claims against the estate that the final account to the Probate Court asserted had been paid (specifically, the margin account at duPont). Count Eight alleges negligence in the failure to apply to the Probate Court for a widow's allowance. Count Twelve alleges that the final account filed in the Probate Court failed to exhibit the true nature of the estate.

[11]The fact that the Surrogate's Court in *Krimsky* entered its decree after a hearing, trial, and subsequent written agreement of settlement, does not distinguish that case in a way that lessens its applicability here. DiMauro had notice sufficient to allow her to make objections in the Surrogate's Court and to pursue litigation like that held in *Krimsky*.

Ordinarily, the acceptance of an administrator's or executor's final account concludes issues about the legality and propriety of investments made by the trustee. *State ex rel. Beardsley* v. *London & Lancashire Indemnity Co.*, 124 Conn. 416, 422-23 (1938). Only in an unusual case, where for example an executor files an account showing property held by the decedent as trustee under the will of a previous decedent, is the Probate Court's acceptance of the account more limited. *Id.* at 423-24. In the latter situation, the decedent trustee is only a conduit of the property of the first decedent, and the executor of the

decedent trustee files a statement of the property found by him without regard to the character of the investments. The Probate Court is not called upon to find anything more than that the executor filed an accurate statement of what he found.

[12]*But cf. Standard Forms Co.* v. *Nave*, 422 F. Supp. 619 (E.D. Tenn. 1976). In *Standard Forms* the state court, before the case was removed, had granted the plaintiff an order restraining the defendant from violating a covenant not to compete. According to Tennessee law, a restraining order granted without notice remains in force until otherwise ordered by the court, unless the order itself provides an earlier termination date. The Court held that in this situation the order was not a "temporary" restraining order and therefore did not come within the rule of *Granny Goose*. 422 F. Supp. at 622. That rationale would also distinguish *Standard Forms* from the instant suit, since the order of the Connecticut Superior Court was tantamount to a TRO.

[13]The motion was marked off the calendar without prejudice, on March 25, 1976.

[14]The petition to the Surrogate's Court was also consistent with the decree of the Connecticut Probate Court. See page 32 of text. The Surrogate's Court was aware of the previous proceedings in Connecticut. Pavia applied to the Surrogate's Court on January 3, 1972, to terminate the continuation of his bond in that Court, in light of the bond filed in connection with the proceedings in Connecticut. The final account submitted to the Surrogate's Court also mentioned and described the Connecticut proceedings.

[15]Harcourt's notes of a telephone conversation with DiMauro on February 18, 1971, state that she wanted to hold the Harvey's Stores shares, and that she wanted to realize $30/share in a market she felt was going up. Pavia wrote a letter to her on the following day, confirming his understanding of her instructions. At her deposition, DiMauro did not remember the letter. Earlier in the deposition, she did recall the February, 1971, telephone conversation, where she discussed selling 5,000 shares of Harvey's Stores stock and said that her husband "told me that it should go up to 30."

After the telephone conversation and Pavia's letter of February 18, 1971, DiMauro signed a letter dated February 21, 1971, authorizing the sale of securities sufficient to pay federal and state taxes and "to cancel the amount of the margin debt in the [duPont] account." This

letter, mentioned by neither side in this suit at any time, has apparently been taken by no one to mean that the margin account should have been closed by sale of stock on conditions other than those mentioned repeatedly by DiMauro.

The instructions given by DiMauro concerning the sale of stock either barred the sale outright, imposed impossible conditions, or operated in contradictory directions. Some correspondence indicates clearly that DiMauro did not want the Harvey's Stores stock sold. At her deposition, in response to a question asking whether she had requested or directed Pavia and Harcourt not to sell the stock at any time between 1970 and 1973, DiMauro answered, "I never said this word to them." Her testimony clouds some issues, but does not create a genuine issue of material fact. *Cf. Perma Research & Developing Co.* v. *Singer Co.*, 410 F.2d 572, 578 (2d Cir. 1969). The fact remains that she did not want the stock sold. The administrator's and lawyers' efforts to understand her instructions, when they became as confusing as her later deposition, show only diligence and care.

The Court takes note of the fact that translations of documents originally written in Italian differ in some respects. DiMauro has objected that translations she has submitted through her counsel differ in significant ways from those submitted by the defendants. But a careful inspection of alternative translations of all relevant documents reveals no difference so significant, either in specific words and phrases or in the tone and emphasis of an entire document, as to raise a genuine issue of material fact.

[16]The market price at the relevant times was approximately 26 and 16, respectively. When the offer of an option (at $1/share) was made for a call of the entire block of stock at 20, DiMauro evidently lowered her sights from $30/share to the range of $26-$28/share. See cable of September 17, 1971, from Turco to Pavia & Harcourt, and letter of September 21, 1971, from Turco to Harcourt.

APPENDIX C

MEMORANDUM OF DECISION ON PLAINTIFF'S MOTION TO REMAND AND DEFENDANT'S MOTION TO DISMISS

This is an action by plaintiff Sebastiana Di Mauro against George M. Pavia, individually and as administrator of the estate of Orazio Di Mauro, and Edgar A. Harcourt d/b/a Pavia & Harcourt. At least in New York, the law firm of Pavia & Harcourt was counsel to defendant Pavia in his capacity as administrator. The estate administration has proceeded to final accounting, and the Probate Court in Bridgeport has ordered distribution. Plaintiff, alleging that defendants have committed both fraudulent and negligent acts with regard to the estate's administration, seeks damages and equitable relief including an accounting and removal of defendant Pavia as administrator. This action was originally brought in Superior Court, Fairfield County, Connecticut, and removed pursuant to 28 U.S.C. § 1441. Plaintiff has now moved to remand the proceedings, or a portion thereof, to Superior Court, and defendant Harcourt has moved to dismiss as to him for lack of jurisdiction over his person.

I.

Plaintiff's motion raises the frequently presented question of the authority of Federal district courts in probate matters. What is clear from numerous Supreme Court pronouncements is that Federal district courts have no jurisdiction in probate matters, *In re Broderick's Will,* 88 U.S. 503 (1874), and may not interfere in the administration of the corpus or with the *in rem* jurisdiction of a probate court, *Princess Lida of Thurn and Taxis* v. *Thompson,* 305 U.S. 456 (1939). They may, on the other hand, hear *inter partes* dis putes which are not ancillary to probate, *Sutton* v. *English,* 246 U.S. 199 (1918), and which "establish the claims" of creditors, legatees, and heirs, *Markham* v. *Allen,* 326 U.S. 490, 494 (1946). It is not always clear on which side of the line a particular case falls. (Compare *Gaines* v. *Fuentes,* 92 U.S. 10 (1875), with *Byers* v. *McAuley,* 149 U.S. 608 (1892)).

The Second Circuit has sought to draw this line on a number of occasions. In *Sullivan* v. *Title Guarantee and Trust Co.*, 167 F.2d 393 (2d Cir. 1948), the plaintiff, suing in federal court, alleged improper administration of a trust, and requested damages, a restoration of the corpus and an accounting. The lower court had already granted an injunction against further proceedings in New York's Surrogate's Court. Finding that it was the practice of the state Supreme Court to concentrate probate matters in the Surrogate's Court, the Court of Appeals voided the injunction and suggested that the District Court deny any further relief.

In *Beach* v. *Rome Trust Co.*, 269 F.2d 367 (2d Cir. 1959), the Court invoked the *in rem/in personam* test of *Princess Lida, supra,* to affirm the lower court's denial of an accounting and distribution of an estate still in the process of administration. However, it required that the District Court hear the plaintiff's claims for a declaration of ownership in certain properties and for breach of trust against the administrator, since neither was thought to interfere with the jurisdiction of the Surrogate's Court.

Both *Sullivan* and *Beach* looked to New York law to determine both the nature of Probate Court jurisdiction and what might constitute interference with it. That this was the proper approach was explicity affirmed in *Lamberg* v. *Callahan,* 455 F.2d 1213 (2d Cir. 1972), a case arising out of a Connecticut probate matter. There the executor and beneficiary of a woman's estate sued the executor and beneficiary of her husband's estate for breach of contract to make a mutual will. Again the court noted that federal jurisdiction was proper only in *inter partes* suits that did not disrupt administration in the probate court. The opinion went on, however, to state a somewhat more mechanical test:

> The standard for determining whether jurisdiction may be exercised is whether under state law the dispute would be cognizable only by the probate court. If so the parties will be relegated to that court; but where the suit merely seeks to enforce a claim *inter partes,* enforceable in a state court of general jurisdiction, federal diversity jurisdiction will be assumed.
> 455 F.2d at 1216.

Since in Connecticut the *Lamberg* suit would have been cognizable in a court of general jurisdiction, the Court ruled it could be heard in Federal district court as well.

The Superior Court is Connecticut's principal court of general subject matter jurisdiction. Conn. Gen. Stat. § 52-10. It may hear all matters (of appropriate jurisdictional amount) not exclusively placed in the Probate Court, *Carter* v. *Carter,* 153 Conn. 603, 612 (1966). It follows from the *Lamberg* rule that this Court's derivative diversity jurisdiction can be invoked whenever the Superior Court has jurisdiction. Since subject matter jurisdiction is based on the nature of the relief sought, *Matthies* v. *Seymour Manufacturing Co.*, 23 F.R.D. 64, 78 (D. Conn. 1959), this Court's jurisdiction depends on the availability of the relief plaintiff requested in Superior Court.

Plaintiff seeks (1) damages, (2) injunctions against the transfer of assets in the estate, against any further action by defendants with regard to the estate, and requiring defendants to transfer all of the estate's assets in their control to plaintiff, (3) an accounting, and (4) removal of defendant Pavia as trustee.

The Superior Court of Connecticut may entertain damages actions against trustees for their alleged breach of duty, *Dettenborn* v. *Hartford-National Bank and Trust Co.,* 121 Conn. 388 (1936). Connecticut's Probate Court, in fact, has no such jurisdiction. *Palmer* v. *Hartford National Bank,* 160 Conn. 415, 431 (1971).

At least in a case where there is a showing of fraud, the Superior Court may issue an injunction restraining the executor of an estate from "further meddling" with the *res,* and may even require that the property contained therein be placed in its custody pending further orders from the Probate Court. *Farwell* v. *Howell,* 117 Conn. 565 (1933), *Miller* v. *McNamara,* 135

Conn. 489 (1949). Though the Superior Court may not, in cases short of fraud, set aside the decree of a Probate Court or (what is the same thing) enjoin its observance by the administrator, *State* v. *Blake,* 69 Conn. 64 (1897), *Miller* v. *McNamara, supra,* 135 Conn. at 496, the injunctions requested here are in furtherance of, and not contrary to, the orders of the Probate Court (a point perhaps buttressed by that court's consent to the original filing of this suit). In any case, plaintiff has alleged fraud as well as negligence and so may be able to obtain injunctive relief under either theory.

Acting as a court of general jurisdiction, the Superior Court may also order an accounting, and it may do so even though identical relief is available in Probate Court. *Dettenborn* v. *Hartford-National Bank and Trust Co., supra,* 121 Conn. at 391-2. *Matthies* v. *Seymour Manufacturing Co., supra,* 23 F.R.D. at 82.

The Connecticut Supreme Court has said that primary jurisdiction to remove an administrator who neglects to perform his duties lies in the Probate Court, *Williard* v. *McKone,* 155 Conn. 413, 415 (1967), a proposition recently recognized in this District, *Davis* v. *Hunter,* 323 F.Supp. 976, 980 (D. Conn. 1970). It may be that, even in cases of impending irreparable injury (such as from the wasting of an estate), the Superior Court is powerless to remove the administrator, but may only enjoin his activities pending removal by the Probate Court. See *Butler* v. *Sisson,* 49 Conn. 580, 589-90 (1882). On the other hand, a complaint seeking, *inter alia,* removal of trustees has withstood a motion to dismiss, thereby implying jurisdiction in the Superior Court to grant such relief. *Matthies* v. *Seymour Manufacturing Co., supra;* see also *McDonald* v. *Hartford Trust Co.,* 104 Conn. 169, 190 (1926) (Superior Court has concurrent jurisdiction to appoint trustees).

According to Connecticut law, then, damages, injunctive relief, and an accounting are all available in Superior Court. According to the rule announced in *Lamberg* they are thereby available in this Court as well. Whether the power to remove an

administrator exists in either court is irrelevant to a motion to remand from one to the other; this power is either in both courts or neither one. A remand for lack of such power would be futile. If it should subsequently be determined that this power is lacking, the only appropriate remedy would be dismissal of this particular claim.

Yet the *Lamberg* rule may not be as broad as it seems, for *Lamberg* itself recalled the Supreme Court's warning that federal jurisdiction must "leave undisturbed the orderly administration of the decedent's estate in the state probate court...." *Markham* v. *Allen, supra,* 326 U.S. at 495; *Lamberg* v. *Callahan, supra,* 455 F.2d at 1216. As to almost all the relief plaintiff requests, this rule of non-interference is not violated. Neither damages nor an accounting have been considered to so interfere, *Matthies* v. *Seymour Manufacturing Co., supra.* And as has been noted, the injunctive relief requested here would enforce Probate Court orders, not thwart them.

The test of non-interference, however, may not be satisfied by the claim for removal of the administrator. Since he was appointed by the Probate Court, Pavia's removal might represent an interference with that court's jurisdiction, and for that reason may be beyond the authority of a Federal court, even if it were within the Superior Court's jurisdiction.

The possibility that this Court may not have jurisdiction to remove the administrator does not require a partial remand of this one claim for relief. In the first place, such power may exist in this Court. *Cf. Matthies* v. *Seymour Manufacturing Co., supra.* Moreover, after further development of this suit Pavia's removal may become unnecessary even if the allegations against him are proved. As far as the Probate Court is concerned, the estate is finally settled. Should plaintiff receive the other relief he requests, it is hard to see at this point what more defendant Pavia's removal would accomplish. Finally, to remand this one claim to Superior Court (assuming for the moment the claim could be considered by that court but not by this one) would be more a waste of judicial resources than a proper respect for considerations of comity.

II.

Defendant Harcourt d/b/a Pavia & Harcourt has moved to dismiss for lack of jurisdiction over his person. Plaintiff claims jurisdiction pursuant to Connecticut's long-arm statute, § 52-59b. That statute grants jurisdiction over a non-resident individual who, *inter alia,*

> (a) (1) transacts any business within the state,
> (2) commits a tortious act within the state..., or
> (3) commits a tortious act without the state causing injury to person or property within the state,...if he
> (A) regularly does or solicits business...in the state, or
> (B) expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce.

Defendant Harcourt claims to fall in none of these categories, and has submitted affidavits to that effect.

The defendant claims that his law firm does no business in Connecticut and has committed no acts, tortious or otherwise (with two minor and unrelated exceptions) in this state. In addition, he denies that the firm has committed tortious acts outside Connecticut, that it expected Connecticut consequences of any acts it did commit, and that it derives substantial revenue from interstate or foreign commerce.

Such denials are insufficient for the purposes of this motion. Defendant's affidavits leave numerous material issues of fact unresolved. Plaintiff alleges that Pavia & Harcourt committed tortious acts within and without Connecticut, among them filing, or causing to be filed in the Bridgeport Probate Court papers which were themselves the product of fraud or negligence, and intentionally or negligently filing papers in the wrong court, thereby incurring needless delay and expense. Such allegations, if developed by discovery and proven at trial,

could satisfy the jurisdictional requirement of § 52-59b(a) (2) and perhaps § 52-59b(a) (1) as well. Defendant cannot foreclose a finding of jurisdiction under any of these subsections by simply asserting that the firm did not commit the acts alleged. *United States* v. *Montreal Trust Co.,* 358 F.2d 239, 242-3 (2d Cir. 1966), *cert. denied,* 384 U.S. 919.

Even if plaintiff can prove that tortious acts were committed only outside the state, he may yet gain jurisdiction under § 52-59b(a) (3). When defendant admits that the firm maintains an office in Italy, he cannot claim as a matter of law at this point in the proceedings that he does not derive substantial income from international commerce. Nor in fact does he deny substantial earnings from interstate commerce, not an unlikely prospect for a firm such as his. These facts, too, must be developed through discovery and trial.

Plaintiff claims that Pavia & Harcourt took an active part in the commission of negligent and/or fraudulent acts in Connecticut. Whether its particular part was played out in New York or in Connecticut, the firm's responsibility for these acts, if proven, would be directly causal and not merely contributory, *cf. Byram River* v. *Village of Port Chester, New York,* Civil No. B-917 (D. Conn. Aug. 20, 1974), and would represent sufficient contacts with Connecticut for due process purposes. *International Shoe Co.* v. *Washington,* 326 U.S. 310 (1945). Since plaintiff alleges facts sufficient to bring defendant Harcourt within the terms of the long-arm statute, and since defendant has failed by his motion and affidavits to place the absence of these jurisdictional facts beyond question, the motion to dismiss must be denied.

Accordingly, plaintiff's motion for remand to the Superior Court and defendant's motion for dismissal as to Edgar Harcourt d/b/a Pavia & Harcourt are both denied.

Dated at New Haven, Connecticut, this 30 day of September, 1974.

/s/ Jon O. Newman
Jon O. Newman
United States District Judge

APPENDIX D

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States, Amendment XIV, §1:

> "...nor shall any state deprive any person of life, liberty, or property without due process of law...."

28 U.S.C. §1450.

Whenever any action is removed from a State court to a district court of the United States.../a/ll injunctions, orders, and other proceedings had in such action prior to its removal shall remain in full force and effect until dissolved or modified by the district court.

Connecticut General Statutes, §52-473

Injunctions may be granted forthwith, if the circumstances of the case demand it, or the court or judge may cause immediate notice of the application to be given to the adverse party, that he may show cause why such injunction should not be granted; but no temporary injunction shall be granted without notice to the adverse party unless it clearly appears from the specific facts shown by affidavit or by verified complaint that irreparable loss or damage will result to the plaintiff before the matter can be heard on notice. It shall be sufficient, on such application for a temporary injunction, to present to the court or judge the original complaint containing the demand for an injunction, duly verified, without further complaint, application or motion in writing.

Connecticut General Statutes, §52-475

Whenever a temporary injunction is granted in any cause before the return day thereof, it may be dissolved or modified by the court or judge who issued it, or by any judge of the superior court; provided a written motion for such dissolution shall be preferred before the return day. After the return day,

such motion shall be addressed to the court in which the action is pending, or, if such court is not actually in session, to a judge thereof; but, in case of the inability of such court or judge, from any cause, to hear such motion, it shall be heard and determined by the superior court or by any judge of the superior court.

Supreme Court, U. S.
FILED
APR 18 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1477

SEBASTIANA DiMAURO,

Petitioner,

v.

GEORGE M. PAVIA, EDGAR A. HARCOURT d/b/a PAVIA & HARCOURT, and BOSTON OLD COLONY INSURANCE COMPANY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE
UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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RESPONDENTS' BRIEF IN OPPOSITION

The respondents respectfully request that this Court deny the petition for writ of certiorari, seeking review of the Second Circuit's opinion in this case.

PRELIMINARY NOTES

References herein to the Petition for a Writ of Certiorari (4) and the Appendix (2a) are to the page numbers from those documents.

Petitioner has omitted several words in the decision of the Court of Appeals, from the first numbered issue on appeal (2a) and from the fifth line of the second paragraph on page 3a. That decision therefore is printed correctly as an appendix to this brief.

STATEMENT OF FACTS

The Statement of Facts filed by petitioner significantly distorts the record in this case, primarily through omission (see the facts as set forth by Judge Newman of the District Court, 4a-7a). Respondents here will point out only certain limited facts material to the questions presented by petitioner.

This case involves a sole beneficiary's suit against the administrator of an estate and the law firm in which he is a partner. Petitioner alleged negligence arising from the administrator's failure to sell stock, which was the principal asset of the estate. Petitioner states that she authorized sale of the stock and implies that retaining the stock was solely the choice of respondent Pavia (4-5). Substantial documentary evidence indicates, however, that respondents continually recommended selling and twice even made arrangements to sell the entire block of stock on favorable terms, but were dissuaded by petitioner's insistence that the stock be sold only on unrealistic terms (5a, 6a, 20a, 21a, 33a).

Petitioner paints herself as a simple, semi-literate Italian dressmaker (15). As the District Court noted, however, petitioner was conversant with sophisticated securities matters and fully capable of giving informed direction or consent regarding such matters (22a).

Petitioner represents that the decree of the New York Surrogate's Court, on October 3, 1975, which the District Court held barred this action, was rendered "without

notice or hearing to the petitioner" (7). In fact, however, petitioner first received notice of the final accounting proceeding in January 1974 and her lawyer was physically present in the Surrogate's Court on February 1, 1974. Thereafter, notice of those proceedings was given to petitioner and her counsel through letters in June, July and August 1975, and through an affidavit filed in the District Court by respondent Pavia in September 1975, just one week before the final decree in the Surrogate's Court.

REASONS FOR DENYING THE WRIT

1. *No special or important reasons exist for granting the writ.*

Petitioner does not allege that this case has any importance beyond the fact situation and the litigants here involved. The case in fact does not have any such importance.

The Court of Appeals "carefully examined the record"and found petitioner's appeal so lacking in merit that it simply affirmed the judgment for the reasons stated in the opinion of the District Court. The District Court previously had searched the entire record and granted summary judgment for respondents on all fourteen counts of the complaint.

2. *Even if this Court were to find error in all of the questions presented, a judgment for respondents could be sustained on still other grounds.*

The judgment below for respondents rests on two independent grounds, estoppel by judgment and equitable estoppel. The trial court held that not only did the final decree of the New York Surrogate's Court bar petitioner's action, but that the "same principles of estoppel by judgment apply to the proceedings in the Connecticut Probate Court" (18a). No error was claimed in this holding, either

in the Court of Appeals or in the petition here. Thus, even if this Court were to find error in all of the questions presented by petitioner, the judgment for respondents still could be sustained on the basis of estoppel by the judgment of the Connecticut Probate Court.

3. *None of the questions presented by petitioner merits consideration by this Court.*

Petitioner has presented four questions for consideration. Respondents discuss them in the same order.

A. *Abstention has never been raised below and the District Court properly exercised its diversity jurisdiction.* Six years after she instituted this suit, petitioner raises an abstention claim for the first time in her petition to this Court. Abstention is a defendant's claim, and not properly a claim made by the plaintiff who initially filed the suit.

Petitioner did claim below that her case should have been remanded to the Connecticut state court of general jurisdiction. This claim was based on the erroneous view that, upon removal, the jurisdiction of a federal court in a diversity action is somehow smaller than the jurisdiction of the state court from which the case has been removed. If the District Court had no jurisdiction, then neither did the state court from which the District Court derived its authority. Petitioner's argument would lead to the conclusion that she filed suit *ab initio* in the wrong court and that her suit should have been dismissed rather than remanded.

The damage claims of petitioner in fact were in personam claims, cognizable by courts of general jurisdiction. Thus, as the District Court held, because federal jurisdiction was properly invoked for at least some of petitioner's claims, it was the duty of the District Court to determine the merits of the controversy (38a). See *Allegheny County v. Frank Mashuda Co.*, 360 U.S. 185 (1959).

B. *The* Granny Goose *question is not crucial to the judgment below and involves interpretation of state law.* The state court order issued at the beginning of this case was granted without notice and without hearing, as is a federal temporary restraining order under Rule 65(b). Although there is no "temporary restraining order" designated as such in Connecticut practice, the state court order, on removal, properly was treated as the equivalent of a Rule 65(b) order. The only ex parte orders under Rule 65 are temporary restraining orders. *Morning Telegraph v. Powers*, 450 F.2d 97 (2d Cir. 1971). Thus, under this Court's ruling in *Granny Goose Foods, Inc. v. Teamsters*, 415 U.S. 423 (1974), the ex parte order expired shortly after removal. In any event, this question concerning interpretation of Connecticut law clearly lacks the significance required for review by certiorari.

Further, the record supports two other reasons for holding the ex parte order ineffective at the relevant time: (a) in accordance with its own terms, the order had been lifted by the "further order" of the District Court (June 12, 1975)(6) that respondents convey the bulk of the estate to petitioner, and (b) it was an invalid attempt by a Connecticut court to restrain proceedings in the New York Surrogate's Court. *Sullivan v. Title Guarantee & Trust Co.*, 167 F.2d 393 (2d Cir. 1948).

Finally, if petitioner really believed the ex parte order to be an effective bar to further action in the Surrogate's Court, she did not raise this point in the District Court when she and her counsel were given notice on several occasions of further action in the Surrogate's Court, as the result of the order of June 12, 1975 (6). In fact, in her Motion for Contempt of September 10, 1975 (6), petitioner specifically mentioned, without protest, further action by respondent Pavia in the Surrogate's Court. The final decree of the Surrogate's Court, finding notice to petitioner and no objection to the final acount, was issued on October 3, 1975 (7).

C. *The "absence of contacts" question is patently without merit.* The third question presented by petitioner argues that *Shaffer v. Heitner*, 433 U.S. 186 (1977), deprives probate proceedings of all finality as to a beneficiary outside the state and permits that beneficiary, after receiving due notice of such a proceeding, to ignore it and later sue the fiduciary in the forum of her choice. Probate decrees then would be effective against nonresidents only when they deigned to participate in the probate proceeding.

To state the argument plainly is to reveal its lack of merit. A holding for petitioner on this issue would overturn *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950), and throw the administration of estates into chaos.

D. *Verification of the translations was immaterial to the decision below.* Petitioner claims that summary judgment should not have been rendered on the basis of unverified translations. She has not alleged, however, that the translations submitted contained any material mistakes or differences. Petitioner thus could not have been harmed by any consideration given to the translations by the District Court.

Petitioner also claims a "genuine issue of material fact" was raised by her single blanket statement (made after this action was filed) that she did not "request or direct the defendants not to sell the estate's stock." Whether she requested or directed such action is immaterial, however, because her acquiescence in the retention of the stock was established by the complete absence of any protest by petitioner to the actions of respondents. The absence of protest continued from 1970 to 1974, despite the opportunity afforded by some 57 written communications between petitioner and respondents, many of which dealt with securities matters. Acquiescence by itself is sufficient for equitable estoppel. *Matter of Garvin*, 256 N.Y. 518 (1931); *Matter of Weston*, 91 N.Y. 502 (1883).

The overwhelming documentary evidence, all of which predated this litigation, was not controverted by petitioner. She filed a one-page conclusory affidavit in opposition to the summary judgment motion and extensive supporting documentation filed by respondents. She did not even file a statement of material facts, as required by local rule. An opposing party may not rest upon "mere denials or conclusory allegations, but must come forward with 'concrete particulars' to show that material issues of fact do exist" (2a). When the evidence justifies a directed verdict, as it clearly did in this case, summary judgment is appropriate. *Sartor v. Arkansas Natural Gas Corp.*, 321 U.S. 620, 624 (1944).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

As counsel for respondents, I hereby certify that three copies of the foregoing brief were mailed on April 17, 1980, to Bruce L. Levin, Bai, Pollock & Dunnigan, Post Office Box 1978, 10 Middle Street, Bridgeport, Connecticut 06604, counsel for petitioner.

Bruce Louden

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 28th day of December, one thousand nine hundred and seventy-nine.

Present: HON. J. JOSEPH SMITH

HON. WILLIAM H. TIMBERS
Circuit Judges

HON. LLOYD F. MacMAHON
United States District Judge
Sitting by Designation

SEBASTIANA DiMAURO,
Plaintiff-Appellant,

v.

GEORGE M. PAVIA, EDGAR A. HARCOURT d/b/a PAVIA & HARCOURT, and BOSTON OLD COLONY INSURANCE COMPANY,
Defendants-Appellees.

Dkt. No. 79-7350

Appeal from the United States District Court for the District of Connecticut.

This cause came on to be heard on the transcript of record from the United States District Court for the District of Connecticut, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is *affirmed* substantially for the reasons set forth in Judge Newman's opinion of April 16, 1979.

Plaintiff Sebastiana DiMauro sued George M. Pavia and Edgar A. Harcourt d/b/a the law firm of Pavia & Harcourt. She charged defendants with negligence in administering and managing her late husband's estate. The district court granted defendants' motion for summary judgment. Plaintiff has appealed from that judgment.

The issues on appeal are:

(1) Do decrees of the Conencticut Probate Court and the New York Surrogate's Court, approving final accountings and discharging defendant administrator, foreclose plaintiff's claims concerning administration of her late husband's estate?

(2) Is plaintiff equitably estopped from asserting claims against defendants for actions she induced or agreed to?

(3) Did the district court err in denying plantiff's motion to remand this case to the Connecticut state court of general jurisdiction?

(4) Did certain of plaintiff's claims become moot subsequent to institution of this suit?

Our careful examination of the record, particularly in the light of the above issues on appeal, satisfies us that Judge Newman properly granted defendants' motion for summary judgment.

As we held in *SEC v. Research Automation Corp.*, 585 F.2d 31 (2 Cir. 1978), summary judgment is proper where (1) there is no genuine issue of material fact and (2) the moving party is entitled to judgment as a matter of law. An opposing party cannot avoid summary judgment by mere denials or conclusory allegations, but must come forward with "concrete particulars" to show that material issues of fact do exist.

The major issues in this case are estoppel by judgment and equitable estoppel. Although we hold that the district court was correct in deciding *both* issues as it did, affirmance of its holding on *either* ground would be sufficient to sustain the summary judgment entered in favor of defendants.

We find no error in the court's conclusion that plaintiff is estopped by reason of the probate proceedings from raising claims of negligence against defendants. Notice and an opportunity to raise objections were provided. Plaintiff had retained counsel to represent her and could have participated and litigated her claims in the Surrogate's Court. Her failure to do so is no bar to the application of the doctrine of estoppel by judgment. Defendants therefore were entitled to judgment as a matter of law.

In concluding that no genuine issue of material fact existed, the court had before it depositions, answers to interrogatories, and affidavits and supporting documents. This is not a case in which summary judgment was rendered on the basis of a premature conclusion that material factual issues were not present. Plaintiff cannot rest upon her denials to prevent summary judgment from being entered against her.

Affirmed.

/s/ _____
J. Joseph Smith

/s/ _____
William H. Timbers
Circuit Judges

/s/ _____
Lloyd F. MacMahon
United States Circuit Judge
Sitting by Designation